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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. ___ 79-1737

TIM Z. OGLE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on November 1, 1979, and the Order of Court denying rehearing entered on March 5, 1980.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, which affirmed the judgment of the District Court, is reported at 613 F.2d 233, and is printed in Appendix A hereto.

The Order of Court denying rehearing and a suggestion for rehearing en banc is not reported and is printed in Appendix B hereto.

JURISDICTION

The Opinion and Judgment of the Court of Appeals was entered on November 1, 1979. Petition for Rehearing and Suggestion of Rehearing en banc was denied on March 5, 1980.

A Stay of Mandate was granted on March 19, 1980, until April 18, 1980 pending certiorari. Petitioner timely filed an application with this Court for an Order Extending the Time to File a Petition for Certiorari until May 4, 1980, which application was granted by an Order of Mr. Justice White on March 24, 1980.

On April 9, 1980, Petitioner filed with the United States Court of Appeals for the Tenth Circuit a Motion for Extension of Stay of Mandate, which has been granted through May 17, 1980, pending Certiorari and which will be continued if that Court is notified by that date that a Petition for Writ of Certiorari has been filed.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where the Congress of the United States specifically set forth the term "corruptly" as an essential element of the offense denounced in 18 U.S.C. 1503 (in the absence of any indication of force, intimidation or threats), may the United States Court of Appeals for the Tenth Circuit (in contrast to other circuits) read the term "corruptly" out of the statute by equating it to merely "any endeavor" to influence a juror or to influence, obstruct, or impede the due administration of justice, regardless of the intent, motive or purpose of the defendant, and thus make the statute subject to attack under the First Amendment?

2. Whether the use of the phrase "unless the contrary appears from the evidence" in an instruction to the jury on the requisites of proof of the specific intent required for conviction under 18 U.S.C. 1503 is plain error, especially where, as here, the defendant was precluded by the rulings of the trial court from fully explaining his intent, motives and reasons to the jury?

3. Whether Mr. Ogle had effective assistance of counsel, where counsel did not adequately prepare for the obvious legal issues which would, of necessity, arise at trial, and particularly did not prepare himself on the crucial issue of proper instruction to the jury as to proof of specific intent, and, thus, failed to protect the appellate rights of Mr. Ogle?

4. Whether Mr. Ogle has been denied due process of law, when after having been cross-examined as to his specific intent was denied the right to respond to the questions of his counsel thereon in redirect examination?

5. Whether Mr. Ogle was denied due process of law, by the rulings of the trial court which precluded him from properly explaining the bases for his belief in the correctness

of the positions advocated by the book, "Handbook for Jurors", in a situation where the jury was instructed to determine whether the contents of such book would influence a juror in the performance of his duties or would impede or obstruct the due administration of justice?

6. Whether Mr. Ogle has been denied due process of law by prosecutorial misconduct, in that the prosecutor, after having been advised out of the presence of the jury that a key witness would claim her right against self-incrimination if asked questions about her W-4 forms, deliberately asked such a question and forced that witness to claim her right against self-incrimination in front of the jury?

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED OR APPLICABLE

The following are set forth in Appendix C: First Amendment, Fifth Amendment, United States Constitution, 18 U.S.C. 201, 18 U.S.C. 1503, 18 U.S.C. 1504, and 18 U.S.C. 1505.

STATEMENT OF THE CASE

On April 5, 1978, an indictment presented by the Grand Jury was filed against Tim Z. Ogle, alleging a violation of 18 U.S.C. 1503, for having willfully, knowingly and corruptly endeavored to influence, obstruct and impede the due administration of justice in a case then pending before the United States District Court for the District of Colorado, by endeavoring to cause to be communicated to one Colleen Hansen, a petit juror, in such case, a pamphlet entitled, "Handbook for Jurists", (sic) (the actual name of the book was "Handbook for Jurors")

The allegations of the indictment arose from an incident of February 21, 1978, when one Mr. Norman Gigax was the defendant in a trial before Judge Winner, charged with filing a false and fraudulent W-4 withholding allowance

certificate. Mrs. Colleen Hansen, a flight attendant for Continental Airlines, was selected as one of the jurors in that case.

The petitioner herein, Mr. Tim Z. Ogle, who was then employed as a pilot with Continental Airlines was present as a spectator at the trial of Mr. Gigax. Mr. Ogle had not known Mr. Gigax prior to that day, and met him at one of the recesses for the first time.

Mr. Ogle recognized Mrs. Colleen Hansen as a Continental flight attendant, whose name he did not know. Mrs. Hansen said she didn't know Mr. Ogle's name, but had known him for seven or eight years.

During the lunch recess, Mr. Ogle entered the same elevator as Mrs. Colleen Hansen and introduced himself. She then recognized him as a pilot working in the same company.

After the lunch recess, Mr. Ogle was asked by Mr. Gigax to assist him in taking notes in that case and with permission of Judge Winner, Mr. Ogle moved to the defense table and did so. Mr. Ogle told Mr. Gigax he was acquainted with the juror, Mrs. Colleen Hansen. The trial recessed about 5:00 p.m. for the evening.

Mr. Ogle then went with his wife and his parents to dinner and then to the United Bank Tennis Classic. Mr. Ogle left the tennis matches at about 8:00 p.m., because he had to fly the following day in addition to attending the Gigax trial and he wanted to get a good night's sleep. (Tr. pp. 253,254,326,329)

Prior to February 21, the Ogles had planned to have dinner with the Lagonis on February 28th. However, on that morning Mrs. Ogle had received a phone call from Mr. Ogle's

attorney that Mr. Ogle had an appointment in Washington, D. C., on February 28th with regard to his tax position. Mrs. Ogle suggested that Mr. Ogle call the Lagonis, tell them about this and rearrange the dinner plans. Mr. Ogle called from the Auditorium about 8:00 p.m., rather than waiting to get home because Mr. Lagoni is a truck driver, who gets up extremely early and goes to bed early. (Tr. pp. 257-259,327-328,333)

Mr. Lagoni answered the telephone, and they discussed the fact that the Ogles could not make the dinner on the planned dinner date. Then, Mr. Ogle asked to speak to Mrs. Lagoni, who was also a Continental flight attendant, at which time he also discussed with her the cancellation of the dinner engagement and possibly resetting the date in view of his projected airline duties. Then, Mr. Ogle mentioned to Mrs. Lagoni that he had seen Colleen Hansen on jury duty that day and he was curious as to whether Mrs. Hansen had ever seen the pamphlet, "Handbook for Jurors", since Mrs. Hansen was the first person he had ever known personally that had been a juror. (Tr. pp. 1334,135,260, 302)

Mrs. Lagoni, though not a social friend of Mrs. Hansen, had known her for about ten years and had on many occasions during that time worked with her as a flight attendant, and had flown with her three or four times that month. During the first trip together that month, Mrs. Hansen had told Mrs. Lagoni she had been summoned for jury duty and probably would not be at work the whole month because of it. At that time, Mrs. Lagoni mentioned that she had a jury pamphlet she wanted Mrs. Hansen to read but she kept leaving it at home. On February 21st, Mrs. Lagoni knew Mrs. Hansen was on jury duty, since when she checked in for her flight, Mrs. Hansen's name was crossed off for "jury". (Tr. pp. 82-83,129,156-157,256)

Mrs. Lagoni testified that after Mr. Ogle mentioned that he had seen Mrs. Hansen that day at the court house and asked if she new her, she said, "By the way I meant to give her a juror handbook and forgot to." To the best of Mrs. Lagoni's recollection, it was she who initiated the conversation about the handbook. This is confirmed by Mr. Lagoni who heard his wife's end of the conversation. (Tr. pp. 82-83,135,157,195,256)

Mr. Ogle did not ask or suggest or infer to Mrs. Lagoni that she call Mrs. Hansen. Mrs. Lagoni called Mrs. Hansen that evening because the call from Ogle refreshed her mind that Mrs. Hansen was on jury duty, and while it was on her mind, she decided to call her and ask if she would like to have the booklet. She discussed this with her husband before she made the call, but with no one else. (Tr. pp. 166,170,196,261)

After this discussion, Mrs. Lagoni called another flight attendant to learn Mrs. Hansen's telephone number. Thereafter, Mrs. Lagoni called Mrs. Hansen. In view of the centrality of this telephone conversation to the entire case[1] the Lagoni version of this conversation will be set out, followed by the Hansen version:

THE LAGONI VERSION:

(a) by Mrs. Lagoni:

> A. Okay, I told her that I assumed she was on jury duty or had been called that day since her name had been crossed off the sheet at work and had been marked "jury" and that I had a pamphlet that I had meant to give her earlier in the month and I wondered if she would like to have it.

---

[1]Since if Mrs. Lagoni's version were believed, Mr. Ogle could not have been convicted either of a violation of 18 U.S.C. 1503 or even of the lesser offense spelled out in 18 U.S.C. 1504.

She said to me, "How did you know I was here?" I said, "Because your name was marked off and because a friend said he had seen you at the courthouse."

And she said, "Who?" And I told her, "Tim," and she said, "Well, I can't read anything that will compromise me."

I said, "This is nothing that will compromise you. It has nothing to do with any kind of case. It is a general information booklet that I think is good for anybody who is sitting on or might ever sit on jury duty, and I thought you might like to have one."

And she said she wasn't interested and I said, "Fine," and then we talked about flying, and that was it.

Q. Did you in that conversation tell her that you had heard she was on a tax case?

A. No, I didn't know what kind of case she was on. I said only that I knew she was at jury duty.

Q. Did you tell her in that conversation or ask her if Tim could bring by the jury pamphlet?

A. No, I said only if she wanted it that I would get it to her. She said she didn't want it, and I left it at that.

Q. Did you tell her when you were going to bring it over to her?

No, I did not. (Tr. pp. 131-132)

****

Q. (By Mr. Nesland) When you talked to Colleen Hansen, did you tell her anything about the jury pamphlets?

A. Only that I thought that it was a good informative book that she would find interesting as she was getting ready to sit on jury duty.

Q. Did you tell her that it was a book on juries and tells you what the Court doesn't tell you?

A. I think I told her something similar to that, that there are things that Judges do not always instruct a juror on. My husband was a policeman in L.A. for many years.

Q. May I ask you to just answer the question.

A. Okay, I may have said that, yes. (Tr. pp. 152)

****

(b) BY MR. LAGONI:

Q. And then she placed a call to Colleen Hansen? Did you hear her end of the call?

A. Yes.

Q. Tell us what you recall of that part of the conversation as you heard it that night.

A. I heard my wife say that she noticed she was gone from work, and then I heard Tim's name mentioned, and then my wife asked if she would be interested in a book about jury duty, and I believe the answer was no because the conversation changed to flying and I believe they talked about babies a little

bit. I am not sure exactly what they talked about, but just general conversation.

Q. Prior to that conversation with Colleen, had you had a discussion with your wife about when you were going — when your wife would take over the handbook?

A. I believe we did, yes.

Q. All right, tell us what your discussion was with your wife?

A. Well, my recollection was that I would watch the baby while Jackie, if Colleen wanted the book, took it down to her.

Q. When?

A. I believe it was going to be — or it was going to be that night. (Tr. pp. 200-201)

****

THE HANSEN VERSION:

Q. Please tell us to the best of your recollection what you said in that conversation over the telephone and what Jackie Lagoni said.

A. Okay, she said, "Hello, this is Jackie."

Q. Would you please speak up.

A. She said, "Hello, Colleen, this is Jackie. I . .r you are on a tax case." And I said, "How do you know that?"

And she said, "A little birdie told me." and then I said, "Oh, you must have talked to Tim," and she said, "Yes."

And I said, "I didn't know you — I didn't know you knew each other," and she said, "Yes, we are very good friends."

And then she said, "Would you mind if Tim dropped by a book this evening on juries and what the Court does not tell you." and I said, "No, I don't want Tim anywhere near the house."

Then she said, "Would you mind if I brought the book by?" And I said, "No, Jackie, I want to go with what the Court tells me."

And then she said, "Well, how is the case going." and I said, "You know, I can't talk about it," and then the conversation went on about work, and then that was it.

Q. What conversation do you recall having with her about work?

A. She said, "Hurry back, the flights are full and —"

Q. Did that end the conversation?

A. Right. (Tr. pp. 89-90)

While Mr. Ogle did not author the pamphlet, "Handbook for Jurors," he has read it several times and subscribes to the general principles contained therein. Mr. Ogle has distributed the handbook and believes there is nothing illegal in so doing. He started to explain that answer when cut

short by the Court with the statement "We are not here for a Fourth of July speech of some kind." (Tr., p. 264) In the past, he has advocated passing the book out to private citizens and jurors, although he has since withdrawn his recommendation about passing it out to jurors. The purpose of the pamphlet is not to influence jurors as to how they should vote in any particular case and makes no reference to types of cases (Tr., p. 266). Mr. Ogle denied any interest, other than humanitarian, in the outcome of the Gigax case.

Mr. Ogle briefly explained his understanding of the meaning of the pamphlet. He further stated that he had done independent research on the subject and could relate the materials on which he had relied, but was not permitted to state to the jury what that research was or the materials upon which he relied. (Tr., pp. 267-269)

On direct examination, Mr. Ogle stated that his call to Mrs. Lagoni was not for the purpose of having the pamphlet delivered or for her to influence Mrs. Hansen in any way on the case in which she was sitting, nor did he try to contact Mrs. Hansen for that purpose (Tr., pp. 269-270).

During cross-examination, the prosecutor queried Mr. Ogle as to his intent and purpose in calling Mrs. Lagoni at some length. Thereafter, on redirect examination, Mr. Ogle's counsel asked him about whether he took any action designed to influence Mrs. Hansen with regard to her jury duty, but an objection thereto was sustained, as well as to a question about whether his call to Mrs. Lagoni was made with the intent to influence Mrs. Hansen. No reason was given for either the objections or the rulings. (Tr., p. 306)

Despite having been warned in open court (prior to impanelment of the jury) that Mrs. Lagoni would claim her rights against self-incrimination if asked about her W-4 forms (Tr., p. 10), the prosecutor did ask her if she changed

her W-4 forms, to which question she promptly claimed her rights under the Fifth Amendment. The Court, during a bench conference requested by Mr. Ogle's counsel, admonished the prosecutor not to proceed further with that line of questioning (Tr., pp. 154-155), took no further curative action, nor did the trial judge, then or later, admonish the jury to disregard the same.

At the close of the Government's case in chief, in ruling upon Mr. Ogle's motion for a directed verdict, the trial court stated that the "Handbook for Jurors" was in itself "... an effort to impede and obstruct justice." (Tr., p. 253) Later, at the close of all the evidence, and after hearing counsel's argument on instructions, he apparently changed his mind and submitted to the jury the issue of whether the handbook would influence a juror or would impede the due administration of justice. This supplemental instruction made no mention of the requirement that the jury find the element of "corruptly."

In his earlier instructions, the trial court defined "corruptly" for the jury as merely any endeavor to influence a juror or to influence, impede or obstruct the due administration of justice. Mr. Ogle had requested and the trial court refused to instruct that the word "corruptly" means a defendant acted with improper motive or with bad or evil or wicked purpose. The Court of Appeals in this case specifically upheld the trial court's action in this and all other challenged matters.

Mr. Ogle, despite a previously unblemished record, was sentenced to confinement for a term of fifteen months and to pay a fine of $500.00.

REASONS FOR GRANTING THE WRIT

1. The write should be granted since, in at least two important respects, the decision below is in conflict with the decisions of other circuits:

A. The interpretation of the word "corruptly" in 18 U.S.C. 1503 (hereinafter 1503); and

B. The propriety of the instruction given at trial on specific intent, and whether such an instruction should be reversed as "plain error."

These conflicts will be addressed in that order.

A. The interpretation of the word "corruptly" in 1503 by the Tenth Circuit is in conflict with the interpretation given that word, in 1503, and in other statutes designed to protect the integrity of governmental processes in other circuits.[2]

In the case at bar, Mr. Ogle tendered the following instruction, which the trial court refused to give.

> "The word 'corruptly' means an endeavor, done with a wicked or evil purpose, to influence a juror in the performance of his or her duties or to influence, obstruct or impede the due administration of justice.

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[2]It must be noted that 1503, as well as 18 U.S.C. 1505, can be violated either "corruptly" or by threats or force. The latter types of violations are in no way involved in the case at bar and are, therefore, not in issue here. It must also be noted that in the case at bar there is not even a hint of bribery or offer of economic advantage of any type. (Cf. *United States v. Roe,* 529 F.2d 629, 631 (4th Cir. 1975) Nor does this case involve any other methodology that might be considered inherently corrupt. It should be noted that while the stress may appear to be on the instructional problem, this issue also necessarily encompasses the problem of whether the evidence pertaining to "corruptly" was sufficient to send the case to the jury under 1503; and also may govern the admissibility of excluded evidence.

> Specific intent to impede or influence a petit juror or to impede or obstruct the administration of justice is an essential element of the offense here charged."

(quoted in the decision below at 613 F.2d 241). This instruction clearly should have been given since, when a defendant is charged under a statute which requires proof of a particular mental state as an essential element of the crime, both the Government and the defendant may rightly insist that the jury be adequately apprised thereof *(United States v. Barclay,* 560 F.2d 812, 818 (7th Cir. 1977)).

The instruction given, in pertinent part, was that the term "corruptly" meant:

> "... [an] endeavor to influence a juror in the performance of his or her duties, or influence; obstruct or impede the due administration of justice." (Quoted at 613 F.2d 238)

The Tenth Circuit approved this instruction and said:

> "All that they [the jury] had to find was that there was a corrupt endeavor which was an effort to *wrongfully* influence the jury." (Emphasis supplied)

(At 613 F.2d 239)[3]

Other circuits interpreting this language have not adopted this simplistic approach.

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[3]The rationale of the Tenth Circuit in approving this instruction would be much more persuasive if the jury had been told that they had to find "wrongfully" in order to convict. They were not so instructed, nor were they given the definition from Bouvier's Law Dictionary, which the Court below quoted at 613 F.2d 238. Had the jury been given either, this issue would not now be before this Court. Further, despite the language of the Court below, the jury was not told that the endeavor had to be an "unlawful" one.

DISTRICT OF COLUMBIA CIRCUIT:

Judge Sirica, in one of the Watergate cases was held to have properly defined "corruptly" as "Having an evil or improper purpose or intent." *(United States v. Haldeman*, 559 F.2d 31, 114, ft. 226 (DC Cir., en banc, 1976), cert. den. 431 U.S. 933 (1977)).

This Circuit also analyzed in detail the requirements for conviction under the various subsections of 18 U.S.C. 201, and set forth the differences in proof for those subsections which required that the act be done corruptly and those which had not such requirements *(United States v. Brewster*, 506 F.2d 62, 67-76 (DC Cir. 1974)). There, the court held that those subsections which included the element of "corruptly" required a " . . . higher degree of criminal knowledge and purpose . . ." (at 506 F.2d 71) than those which did not. (The comparable statutory scheme here involves 1503 and 18 U.S.C. 1504, which makes unlawful (but a mere misdemeanor) the act of writing or sending a juror a written communication for the purpose of influencing such juror in a pending matter, but does not require that the same be done "corruptly."

FIRST CIRCUIT:

In a case in which there was no doubt that an endeavor to influence a juror had been made, Chief Judge Coffin, speaking for this Court, stated that the "critical ingredient" was "corrupt motive." *(United States v. Lazzerini*, 611 F.2d 940, 942 (1st Cir. 1979)) In *Lazzerini*, the defendant endeavored to utilize the services of a juror's sister to influence that juror and tell the juror that the defendant was a nice guy and innocent (at 611 F.2d 941).

SECOND CIRCUIT:

> "Whether the endeavor was 'corrupt' was a question for the jury . . . , under proper instructions emphasizing that the endeavor had to be 'motivated by an improper purpose.' "

(United States v. Fasolino, 586 F.2d 939, 941 (2d Cir. 1978), affirming 449 F.Supp 586 (WD NY 1978)), wherein the trial court had specifically held that not every endeavor to influence can be deemed to be "corrupt" (at 449 F.Supp. 587).[4]

In affirming a decision of acquittal by Judge Weinstein, at the trial level, the court held that the finder of fact would have to determine if the endeavor was made "corruptly," and then said: "This is a mixed question of law and fact, if not one of fact alone;" *(United States v. Fayer,* 523 F.2d 661, 664 (2d Cir. 1975)).

> 'The trial court's charge, which included an instruction to the effect, that appellant must be found, beyond a reasonable doubt, to have acted 'corruptly,' defined as 'with improper motive, a bad and evil purpose,' was adequate to apprise the jury that appellant could not be convicted for attempting to obtain what he believed to be a true statement."

(United States v. Abrams, 427 F.2d 86, 90 (2d Cir. 1970), cert. den. 400 U.S. 832 (1970)) (While the *Abrams* case dealt with a violation of 18 U.S.C. 1505, a comparison of that statute with 1503 shows that the word "corruptly" is used for the same purpose in each and that there is no reason in either law or logic that the word would have different mean-

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[4]It should be noted that in *Fasolino,* as in the case at bar, the Government argued that any endeavor to influence is, *per se,* corrupt. Neither the trial court nor the Second Circuit accepted that argument in contrast to the views of the Tenth Circuit here.

ings as between the two statutes. The two of them and 18 U.S.C. 201 are all designed to protect the integrity of governmental process. The similarity in language structure and raison d'etre indicates that 1503 and 1505 should be interpreted *pari passu*. *(Northcross v. Memphis Board of Education,* 412 U.S. 427, 428 (1973)).

This Circuit also made the same distinctions between those subsections of 18 U.S.C. 201 which require the element of corruptly and those which do not as did the DC Circuit. *(United States v. Irwin,* 354 F.2d 192, 197 (2d Cir. 1965), cert. den. 383 U.S. 967 (1966))

FOURTH CIRCUIT:

> "The statute requires only proof of an endeavor, . . . , and makes that act a crime, *if the endeavor is a corrupt one* . . . . Under Section 1503, the intent or motive of the person charged as an inducer is of paramount importance." (Emphasis supplied)

(United States v. Baker, 611 F.2d 964, 967, 968 (4th Cir. 1979))

> " . . . the term corruptly means for an improper motive."

(United States v. Martin, 166 F.2d 76, 79 (4th Cir. 1948))

FIFTH CIRCUIT:

In discussing the sufficiency of an instruction at the trial level, the court held:

> "The second paragraph begins by stating, correctly, that the word 'corruptly' in Section 1503 'means a

> defendant acted with improper motive or with bad or evil or wicked purpose."

(United States v. Partin, 552 F.2d 621, 642 (5th Cir. 1977); accord: *United States v. Haas*, 583 F.2d 216, 220 (5th Cir. 1978))

EIGHTH CIRCUIT:

The mere act of endeavoring to influence a witness to change her story is not necessarily a violation of a predecessor statute of 1503, if the person making such endeavor believes the earlier version to have been false and seeks to have the witness now tell the truth. That endeavor is not corrupt conduct. *(Harrington v. United States*, 267 Fed. 97, 101 (8th Cir. 1920))

NINTH CIRCUIT:

> "The word 'corrupt' in the statute [1503] means for an evil or wicked purpose."

(United States v. Ryan, 455 F.2d 728, 734 (9th Cir. 1972))

In an earlier case, this Circuit analyzed several previously decided cases and arrived at the conclusion that the same acts might or might not be violative of 1503. The difference was in the intent or motive of the person charged with the act. Thus, influencing a witness to tell the truth, as in *Harrington, supra,* would not be violative of the act because that would not be corrupt. *(Cole v. United States*, 329 F.2d 437, 440-441 (9th Cir. 1964), cert. den. 377 U.S. 954 (1964))

This Circuit has also adopted the "heightened criminal intent" test used by the DC Circuit, in *Brewster, supra,* in distinguishing between those subsections of 18 U.S. 201

which require proof that the act was done "corruptly" and those which do not. *(United States v. Strand,* 574 F.2d 993, 995 (9th Cir. 1978))

(Counsel have been unable to find any specific expressions as to the meaning of the word "corruptly" in 1503 from any of the remaining circuits.)

If this were the only error in this record, this conviction could not stand since the instruction on the meaning of "corruptly" used an "effects only" test, in a situation where state of mind is critical. *(United States vs. United State Gypsum Company,* 438 U.S. 422, 46 U.S.L.W. 4937, 4941 (1978))

B. The decision of the Tenth Circuit in the case at bar on the legal adequacy of the trial court's instruction on specific intent conflicts with decisions in other circuits, as does its use of the "plain error" test.

The trial court gave an instruction which has been aptly described as "an invitation to reversal" *(Devitt & Blackmar,* Federal Jury Instructions, Section 14.13, p. 403), in these words:

> "While witnesses may see and hear and thus be able to give direct evidence of what a defendant does not fail to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted, but what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged, and it is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted, so unless the contrary appears from the evidence the jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should rea-

> sonably have expected to result from any act knowingly omitted by the accused." (Tr., May 9, 1978, p. 8, l. 5-18)

The Tenth Circuit after distinguishing *Sandstrom v. Montana*, ___ U.S. ___, 47 U.S.L.W. 4719 (1978), on the basis that the instruction in *Sandstrom* used the word "presumes" rather than "infer" as was done here, went on to hold:

> "... The instruction in our case simply allowed the jury to draw a permissive inference from a basic fact, a process which is nothing more than the deductive reasoning which is employed in the consideration of all circumstantial evidence. To allow the jury to pursue a deductive process on a permissive basis is far different from advising the jury that the law *presumes* that a person intends the ordinary consequences of his voluntary acts. The latter form reverses the burden of proof, the former does not.

(At 613 F.2d 243). In so holding, the Tenth Circuit was following its earlier holding in *United States v. Heath*, 580 F.2d 1011, 1025 (10th Cir. 1978). Generally, it may be truly said that the Tenth Circuit is more favorably inclined to this burden shifting instruction than most, if not all, of the other circuits.

While the Tenth Circuit's position is not as much in the minority as it is in the definition of "corruptly," there is sufficient conflict both as to the propriety of the instruction and as to the application of the plain error test, where timely objection was not made, to make this case worthy of the grant of a writ. The various United States courts of appeal should all be applying the same rule and the same standard of appellate review on instructions to the jury with regard to finding specific intent from circumstantial evidence. This is

an issue common to a very high percentage of criminal trials and the fate of the defendant should not be dependent on the geographic location of his trial. Today, it unfortunately is and will continue to be until this Court speaks clearly on the issue.

The conflict between the circuits on this point is clearest when one compares the result reached by the Tenth Circuit with that of the Second.

An almost identical charge to that given in the case at bar was held to be plain error of constitutional proportions despite a failure to object thereto at trial. *(United States v. Robinson,* 545 F.2d 301, 305-306 (2d Cir. 1976)) In *Robinson,* the condemned charge read:

> "In determining the issue of intent in this case a jury may reasonably infer, as I said before, that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted.
>
> So, unless the contrary appears from the evidence, the jury may draw the inference that the defendant intended all the consequences which one in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the defendant. (At 545 F.2d 305)

If anything, the charge quoted above was a more permissive one than that given by Judge Arraj in the case at bar. Nevertheless the Second Circuit held:

> "Thus, the 'natural and probable consequences' charge, particularly when, as here, it contains the phrase 'unless the contrary appears from the evi-

dence,' is a burden-shifting charge which has the potential for misleading the jury with respect to the requirement that the government must prove every element of an offense beyond a reasonable doubt." (At 545 F.2d 306)

In that same year, another Circuit, the Fourth, indicated that it might well have held a burden-shifting instruction to be "plain error" but did not need to reach that decision since it reversed the decision below for other reasons (*United States v. Arthur*, 544 F.2d 730, 736-737 (5th Cir. 1976))

Other circuits have reached similar results (e.g., *United States v. Orrico*, 599 F.2d 113, 119, ft. 5 (6th Cir. 1979); *United States v. Diggs*, 527 F.2d 509, 514-515 (8th Cir. 1975)).

Many circuits appear to apply a variety of standards to burden-shifting instructions, dependent upon such factors as:

a. The strength of the Government's case, particularly where the only issue was the identity of the defendant as the wrongdoer (e.g., *United States v. Reeves*, 594 F.2d 537, 540-541 (6th Cir. 1979); but reach the opposite result where specific intent was, as in the case at bar, a key element in dispute (*United States v. Schilleci*, 545 F.2d 519, 524-526 (5th Cir. 1977).)

b. The instructions taken as a whole show that the defendant could not have been prejudiced or the jury misled (*Cohen v. United States*, 378 F.2d 751, 755 (9th Cir. 1967). This approach has now been condemned in an en banc decision of the Fifth Circuit, which declared that prospectively it would not approve a burden-shifting instruction and would not consider the same to ". . . be absolved because other phrases defining the proper bur-

den of proof are included in the instructions, no matter how often such corrective phrases are repeated." *United States v. Chiantese,* 560 F.2d 1244, 1255 (5th Cir. 1977). That Court went on to declare that the error would not be one requiring automatic reversal, but that consideration of the issue ". . . shall not include consideration of whether a defective charge has been cured by prior or subsequent statements." (*Id.*) Thereafter, the Third Circuit has also prospectively adopted the rule as enunciated in *Chiantese* (*United States v. Garrett,* 574 F.2d 778, 780-783 (3rd Cir. 1978), cert. den. 436 U.S. 919 (1978)).

c. The erroneous instruction on burden of proof was harmless beyond a reasonable doubt (e.g., *Dunn v. Perrin,* 570 F.2d 21, 24-25 (1st Cir. 1978); *United States v. Harrigan,* 586 F.2d 860, 862-863 (1st Cir. 1978).

This multiplicity of standards of appellate review makes the law appear to be what equity was once called: "The length of the Chancellor's foot."

Regardless of how it is approached, the fundamental question remains: What is the vice of the burden-shifting instruction given in this case? Lest counsel be accused of a partisan analysis, the analysis made by *Devitt & Blackmar, supra,* at Section 14.13, p. 404, is:

"The jury may mistakenly believe that it is permissible to infer specific knowledge or intent solely from the doing of a particular act, without regard to the totality of circumstances; or that the occurrence of that particular act shifts the burden of proof of knowledge or intent from the prosecution to the defense; or that the question is whether a reasonable man in similar circumstances would have had the requisite knowledge or intent, rather than whether the accused actually had it."

The instruction currently recommended by *Devitt & Blackmar* on this issue is:

> "Sec. 14.13 Proof of Intent
>
> Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.
>
> You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence." (p. 401)

Even a cursory comparison of the above with the instruction given will show the tremendous difference in the freedom of decision allowed to the jury. For one thing, they are told that they *may* consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of his acts, rather than as they were told in this case "it *is* reasonable to infer" (emphasis supplied), etc. Thus, despite the fact that 1503 is a specific intent offense, the instruction given to this jury told them, in effect, that it is always reasonable to so infer, rather than permitting them to decide if it was reasonable in the case at bar. Therefore, the mere fact that Mr. Ogle's call to Mrs. Lagoni might have triggered her call to the juror might well have seemed to the jury sufficient to prove specific intent by itself and without requiring further determination on their part. This was compounded by the "unless the contrary appears from the evidence" instruction. (*United States v. Davis,*

608 F.2d 698, 699 (6th Cir. 1979); *United States v. Ariza-Ibarra,* 605 F.2d 1216, 1227-1288 (1st Cir. 1979)). In testing this error, the Court is urged to remember that Mr. Ogle was denied the right, on redirect examination, to make a specific denial, under oath, of the requisite criminal intent.

Under these circumstances, especially, this was plain error. Whatever the ultimate outcome may be, whichever standard of appellate review this Court may choose, it is clearly under a duty to choose one. This thicket must be cleared. The federal courts must speak with one voice as to the standard to be applied in jury instructions on specific intent, which have a tendency to impermissibly shift the burden of proof, (which this Court has reiterated is in itself an error of constitutional proportions (*Mullaney v. Wilbur,* 421 U.S. 684, 699-701 (1975)), as to the standard of appellate review, and as to the application of that standard to situations where timely objection has, or has not been made.[5]

2. The Writ should be granted in this case because it involves two questions of great public importance.

A. The first and most important of these is the chilling effect of the decision below on the exercise of First Amendment Freedoms.

While not expressly stated, it is obvious from a reading of the opinion of the Tenth Circuit, and even more obvious from the remarks of the trial court, in the transcript, that the ideas expressed in "Handbook for Jurors" were allowed to serve, in lieu of evidence, of the required element "corruptly." Since the Court could not openly so state, it had to define "corruptly" in such a way as to totally remove it from the "cluster of ideas," which the Congress adopted in incorporating that word into 1503 (see *Morrisette v. United States,*

[5]And as will be seen below on the duty of defense counsel with regard thereto.

342 U.S. 246, 263 (1952)). That cluster of ideas has been illustrated by the many decisions of the federal courts set forth above. These are far from new. The attention of the Court is respectfully invited to the many cases cited and definitions given to the term "corruptly" in 9A, *Words and Phrases,* pp. 576-579, which illustrate the common law meaning of the term. Since Congress provided no other definition, the term should be interpreted according to that meaning. *(Morrisette v. United States, supra,* at 342 U.S. 263); see also: *Burns v. Alcala,* 420 U.S. 575, 580-581 (1975)).

The equation of "corruptly" with "any endeavor" places a chilling effect upon the exercise of First Amendment freedoms. Despite the specific factual situation of the case at bar, there can be no question of Mr. Ogle's standing to attack an interpretation which would convert 1503 into a barrier to freedom of expression (*Dombrowski v. Pfister,* 380 U.S. 479, 486-487 (1965); *N.A.A.C.P. v. Button,* 371 U.S. 415, 432-433 (1965)).

> "Where the regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute and not the accusation or evidence under it, which prescribes the limits of permissible conduct and warns against transgression."

(*Thornhill v. Alabama,* 310 U.S. 88, 98 (1940)).

This case did not start as, and should never have become, a First Amendment *cause celebre.* It is one now, largely because of the fact that the Court below not only chose to affirm the conviction, but also to publish its decision. Had that decision remained unpublished only the unfortunate Mr. Ogle would have been affected.

The problem is that if "any endeavor" to influence a juror or to influence the due administration of justice is, *ipso facto,* "corrupt" many otherwise protected activities would

fall under the ban of 1503. (For this purpose, we need not even consider lawyer's arguments, judge's comments and instructions, or the expressions of witnesses, although carried to its ultimate conclusion, these too would be suspect.) A simple illustration may suffice. Suppose a group were to be formed whose purpose was to reestablish trial by jury, in the sense of the powers of the common law jury, extant at the time of the adoption of our Constitution, and paraphrasing his famous dictum in *Horning v. District of Columbia,* 254 U.S. 135, 138 (1920), were to take out prominent advertisements in major newspapers throughout the United States and place ads in television and on radio for prolonged periods, with the stated purpose of "educating" sitting and potential jurors:

> ONE OF THE GREATEST AMERICAN JURISTS, MR. JUSTICE HOLMES, SAID THAT EVERY JURY HAS THE POWER TO ACQUIT IN THE TEETH OF THE LAW AND THE EVIDENCE.

There can be no question that such an effort would be an endeavor to influence jurors and to influence the due administration of justice in the United States.

Another analogy may also be instructive. Suppose such a group raised funds for the avowed and accomplished purpose of distributing, *gratis,* a copy of Chief Judge Bazelon's separate opinion in *United States v. Dougherty,* 473 F.2d 1113, 1138-1144 (DC Cir. 1972), to every household in the United States with this inscription on the cover:

> READ, KEEP AND REMEMBER IF YOU ARE NOW ON JURY DUTY OR ARE EVER CALLED TO BE A JUROR.

There can be no question that such an effort would be an attempt to influence jurors or to influence the due administration of justice (1503). (It must be noted the statute is in the disjunctive, and does not require that such endeavor to influence be for the purpose of impeding or obstructing the due administrative of justice.)

There can equally be no question that such endeavors would be in violation of 1503 if the word "corruptly" was equated to "any endeavor". There can be equally no question, that if 1503 were so interpreted it would violate the First Amendment. While one may despise the doctrine of "jury nullification," it may be lawfully espoused, if the First Amendment means what this Court has so frequently said it means.

Such a construction would put 1503 on a direct collision course with the First Amendment.

Such a collision course is at the same time unnecessary and foolish. Where the language of the statute leaves the Court any freedom of decision, it should and must interpret that statute to avoid constitutional infirmities (*Swain v. Pressley*, 430 U.S. 372, 278, n. 11 (1977)).

As demonstrated above, it appears doubtful that any circuit, but the Tenth, has or is likely to (unless this Court allows the decision below to stand) follow the doctrine that "corruptly" means simply "any endeavor." The chilling effect of such a decision on First Amendment freedoms, even if limited to the states of Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming, cannot be allowed by this Court.

B. The second issue of great public importance is whether the test of reasonably effective assistance of competent counsel includes the preservation of the appellate rights of a defendant.

Is the effective assistance of competent counsel, which is the right of a defendant in a felony case (*McMann v. Richardson*, 397 U.S. 759, 771 (1970)), limited to trial tactics and advocacy? Does it, as we submit that it should, also encompass the preservation of the appellate rights of the defendant by timely motions or objections supported by appropriate legal research. There can be no question of the right of counsel to do so and obtain ". . . the court's considered ruling." (*Sacher v. United States*, 343 U.S. 1, 9 (1951).)

Having the right does defense counsel have a concomitant duty to make such objections?, beyond question he does. *(ABA, Standards Relating to the Prosecution and Defense Function, Defense Nos. 1.1 (b) and 7.1 (d)).*

Where counsel fails in such duty, especially through ignorance or lack of adequate legal preparation, has the defendant had the requisite effective assistance of competent counsel? Is such failure to make timely objections and/or submission of proper jury instruction "... within the range of competence of attorneys in criminal cases."? (*McMann v. Richardson, supra*)

While clearly an attorney may make errors, and who among us have not, such errors cannot be "... so flagrant that a court can conclude it resulted from neglect or ignorance rather than from informed professional deliberation." *(Marsullo v. State of Maryland,* 561 F.2d 540, 544 (4th Cir. 1977), cert. den. 435 U.S. 1011 (1978)).

Obviously, the Tenth Circuit is not so persuaded:

> "Ogle further maintains that he is entitled to a reversal based on lack of effective assistance of counsel. He points to failures to make objections and form an adequate record for appeal by the trial attorney. An issue was raised as to what standard is to be applied to determine when counsel is incompetent. Note: There is no evidence whatever that there was incompetent counsel. The representation was found by Judge Arraj to have been highly adequate, and from our view of the record we agree with this appraisal." (At 613 F.2d 228)

While normally the determination on this issue of the trial judge is highly persuasive, this judgment cannot be given the same weight where, as here, the failure at trial is the failure to protect appellate rights. After all, if the trial judge thought his rulings and instructions were erroneous,

he would not have made them. Therefore, a failure to make objection to what the judge considers to be a correct legal position will not impress him as inadequacy of counsel.

The Tenth Circuit correctly points out that Mr. Ogle's objection to his representation by his counsel at trial was precisely in that area. Thereafter, the decision below never addresses the point, but instead on at least three occasions (at 613 F.2d 238, paragraphs 4 and 5; p. 242), the Court below stated that since there was a failure to object to the inferred intent instruction this left such instruction to be tested under the plain error rule and indicated that such failure "... weakens the position of the defendant appellant" (at 613 F.2d 242).

The effectiveness of counsel is not tested merely by his performance in the court room, but must also be measured by his familiarity with both the facts and applicable law *(Hollinghead v. Wainwright,* 423 F.2d 1059, 1060 (5th Cir. 1970); *Goodwin v. Swenson,* 287 F.Supp. 166, 176 (WD Mo. 1968)). The duties of counsel for the defense include having performed adequate legal research *(United States v. DeCoster,* 487 F.2d 1197, 1204 (DC Cir. 1973)), and his failure to do so and to bring the correct statement of the law to the attention of the trial court is sufficient to establish ineffective assistance of counsel *(Moran v. Morris,* 478 F.Supp 145, 162-163 (CD Calif. 1979); *Kott v. Green,* 303 F.Supp. 821, 823 (ND Ohio 1968)).

> "Where the defense is substantially weakened because of the awareness on the part of defense counsel of a rule of law basic to the case, the accused is not given the effective representation guaranteed him by the Constitution."

(Beasley v. United States, 491 F.2d 687, 695 (6th Cir. 1974)), quoting with approval from *(Poe v. United States,* 233 F.Supp. 173, 1978 (D DC 1964)).

These rules have clear application to the case at bar. The most important omission was the failure to object to the instructions on specific intent and to tender proper ones. This failure simply cannot have been a matter of trial tactics. An obviously critical issue in this trial was the issue of the requisite specific intent to violate 1503. Long prior to this trial, the Tenth Circuit had said that instructions such as those given in the case at bar would leave a defendant to the tender mercies of the plain error rule where no objection was timely made *(United States v. Woodring,* 464 F.2d 1248, 1251 (10th Cir. 1972); *McCarty v. United States,* 409 F.2d 793, 799-801 (10th Cir. 1969), cert. den. 396 U.S. 843 (1949)); and *United States v. Tijerina,* 407 F.2d 349, 355 (10th Cir. 1969), cert. den. 396 U.S. 843 (1959)).

Even rudimentary preparation for trial of a specific intent case would have led counsel to consideration of appropriate instructions on specific intent measured against the factual posture of his case. Elementary research would at least have required examination of the 1977 edition of *Devitt and Blackmar* which would have shown the very substantial changes in what is now Section 14.13, from even the 1970 edition.

A bit more research would have shown him, and he then the trial court, that the Tenth Circuit has specifically held it error to instruct that "it is reasonable to infer that a person ordinarily intends the natural or probable consequences of acts knowingly done or knowingly omitted" (Tr., p. 8, 1. 10-12) in a specific intent case *(United States v. Woodring, supra,* at 464 F.2d 1251). In *Woodring,* the Tenth Circuit held that while error, since no objection had been made thereto, the error would be tested under the plain error rule *(id.).* When a counsel, who has and does practice in the federal courts, allows an erroneous instruction, which negates the correct specific intent and burden of proof instructions go unchallenged, can it be truly said that he has provided his client with effective assistance of counsel?

The probable efficacy of such an approach is established by the comments of Judge Arraj at the hearing on the Motion for New Trial. In that Motion, a generalized objection was made to the adequacy of instructions on specific intent. In response thereto Judge Arraj said, in pertinent part:

> "Specific intent instructions, if I recall right, are the stock instructions that are taken out of the third edition of Devit (sic) and Blackmar, used in this Court, all divisions. Amost (sic) on a daily basis." (Tr., Hearing on June 15, 1978, p. 8, 9)

From Judge Arraj's comments, it would appear that had he been shown at trial, the then current edition of *Devitt and Blackmar* on this point, the burden-shifting instruction probably would not have been given.

It would be difficult, to say the least, to contend that this failure by counsel led to only harmless error.

3. The Writ should be granted by this Court in the exercise of its supervisory powers over the lower federal courts, in order to sustain public confidence in the administration of justice.

A. The trial court abused its discretion in rejecting relevant evidence which the jury should have, but was not allowed, to hear.

(1) With regard to his specific intent.

Mr. Ogle's testimony on this point in direct examination was:

> Q. Now, Mr. Ogle, going back to February 21, 1978, the date of the telephone conversation between you and Jacquelyn Lagoni, did you on that day or at

any other time attempt to contact Colleen Hansen, who was a juror in the case of United States vs. Gigax, for the purpose of influencing her decision in that trial?

A. No, I did not.

Q. Did you on or about February 21st of 1978 have Jacquelyn Lagoni contact Colleen Hansen for the purpose of delivering to her a copy of this handbook?

A. No, I did not do that.

Q. Did you on or about that date, February 21, 1978, contact Jacquelyn Lagoni for the purpose of having her see if she could influence the juror Colleen Hansen in any way in that case?

A. No, I did not. (Tr., pp. 269-270)

During cross-examination, the prosecutor made detailed inquiry (Tr., pp. 286-301) into Mr. Ogle's purposes and intent in making his call to the Lagonis. Then on redirect examination, the following occurred:

Q. Now, did you, Mr. Ogle, on the night of February 21st of 1978, to your recollection and to your belief, take any action designed to influence Colleen Hansen with respect to that Gigax case?

MR. NESLAND: Objection.

THE COURT: Objection sustained.

> Q. When you called Jackie Lagoni on the night of February 21, 1978, did you do so with the intent to influence Colleen Hansen in the exercise of her duty?
>
> MR. NESLAND: Same objection.
>
> THE COURT: Same ruling. Sustained.(Tr., pp. 305-306)

The decision below held that the exclusion of this evidence was not prejudicial, essentially because it was repetitious.

If the Government had not chosen to go into Mr. Ogle's intent during cross-examination, it might have been proper, or at least not an abuse of discretion to refuse to allow him to reiterate his true intentions at the time in question on redirect. However, the Government did vigorously cross-examine him on his intent and, therefore, he should have had an opportunity to ". . . explain and clarify relevant matters in his testimony which have been weakened, distorted, or obscured by his cross examination." *(81 Am. Jr. 2d,* Witness, Sec. 425, p. 433)

> "Cross examination on a part of a transaction enables the opposing party to elicit evidence on redirect examination of the whole transaction at least to the extent that it relates to the same subject."

(United States v. Barrentine, 591 F.2d 1069, 1081 (5th Cir. 1979))

It is proper on redirect examination to have a witness explain and complete his testimony which was the subject of cross-examination *(Copes v. United States,* 345 F.2d 723, 724 (DC Cir. 1964); *Zacher v. United States,* 227 F.2d 219, 227 (8th Cir. 1955), cert. den. 350 U.S. 993 (1956); *Kowalchuk v.*

United States, 176 F.2d 873, 878 (6th cir. 1949); see also *2 Wright and Miller, Federal Practice and Procedure (Criminal),* Sec. 416, p. 185).

On this point, i.e., the right to clearly make denial of specific intent, this case is remarkably similar to one decided, early in this century, by this Court *(Crawford v. United States,* 212 U.S. 183, 202 (1909)).

> "It is hardly possible to imagine a case where greater care was necessary in regard to the exclusion of proper and admissable evidence than in the case before us. As we have said, it was entirely possible that the jury might believe that both Lorenz and Machen were guilty, as alleged, in the indictment for conspiracy, and that the defendant was, nevertheless, perfectly innocent. No material and proper evidence upon that issue should have been excluded, and the error committed was not, in our opinion, clearly shown to have been harmless." (At 212 U.S. 205)

Similarly in the case at bar, the jury could well have believed that Mrs. Lagoni (who had been granted immunity) intended by her phone call to have endeavored to influence the juror, but could also have found that Mr. Ogle did not intend for her to make that call or any such endeavor. Under such circumstances, the rule as stated in *Crawford* is that:

> "There is a presumption of harm arising from the existence of an error committed by a trial court against the party complaining, in excluding material evidence on a trial, especially before a jury. It is only in cases where the absence of harm is clearly shown from the record that the commission of such an error against a party seeking to review it is not cause for reversal of the judgment. *(Deery v. Cray,* 5 Wall. 795; 807; *Smiths v. Shoemaker,* 17 Wall. 630.)"

(At 212 U.S. 203); accord: *(Miller v. United States*, 120 F.2d 968, 973 (10th Cir. 1941))

This error in the case at bar is compounded by the fact that no reason was stated by the prosecutor for his objection, nor by the trial court for sustaining the same. An objection to the admission of evidence should state accurately and with a reasonable degree of specifity the basis for such objection *(United States v. Indiviglio*, 352 F.2d 276, 279 (2nd Cir., en banc, 1965), cert. den. 383 U.S. 907 (1966)).

The sequence of events, where objection was made and sustained with no reasons given by either prosecutor or judge, could only have left the jury with the impression that the trial court considered that any answers Mr. Ogle might have given were unimportant. Nevertheless, this was a specific intent offense and those answers were absolutely crucial to his defense. Such a gross error in the exclusion of critical evidence would alone warrant reversal (*2 Wright and Miller, supra,* Sec. 556, p. 509), and justifies the exercise by this Court of its supervisory powers.

(2) Evidence which would have assisted Mr. Ogle in persuading the jury that his motives were not "corrupt" was improperly excluded. It must be frankly stated here that if the decision below is correct as to the meaning of the term "corruptly," then the decision of the trial court to exclude the evidence referred to herein may have been correct or at least harmless. Conversely, if "corruptly" means "with an evil intent, purpose or motive" then Mr. Ogle was improperly prevented from presenting a critical defense and thus denied due process.

Mr. Ogle was improperly refused permission to present evidence which might well have persuaded the jury that he had not acted "corruptly" within the proper meaning of that term. Even in a case of a violation of a statute where the

mens rea is minimal, this Court has recently said that an accused person may properly present evidence of the circumstances which led to his unlawful actions (*United States v. Bailey*, _____ U.S. _____, 48 U.S.L.W. 4104, 4106-4107, 4109 (1980)).

Despite undoubted proof of an intentional act an accused may submit evidence from which ". . . the jury might nevertheless find that it was not prompted by bad faith or evil intent which the statute makes an element of the offense." (*United States v. Murdock*, 290 U.S. 289, 397-398 (1933)).

In any event, these questioned rulings denied Mr. Ogle ". . . the opportunity to be heard respecting the justice of the judgment sought." (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1952) (Mr. Justice Frankfurter concurring).

The pertinent portion of the record shows that after Mr. Ogle had briefly explained his understanding of the contents of "Handbook for Jurors", the following occurred:

> "Q. And is your belief in these propositions based solely upon what you have read in this pamphlet, Exhibit 3-B?
>
> A. No, it is not. That's just a synopsis that someone else prepared, and I have done some independent study on the subject also.
>
> Q. Okay, and just briefly could you relate to us what other materials you have relied on in arriving at your belief that the propositions in this handbook are valid and proper statements?
>
> A. Yes, I could.

Mr. Nesland: Is that the end of the question? Objection.

The Court: On what grounds?

Mr. Nesland: It is irrelevant. We are talking about this jury pamphlet and what it says.

The Court: Sustained.

Q. Mr. Ogle, have you done any research to satisfy yourself in your mind that the propositions in this pamphlet are correct?

A. Yes, I have.

Q. And could you tell us of what that research consisted?

MR. NESLAND: Objection.

THE COURT: Yes, same question, and it is the same ruling. "Sustained." (Tr., pp. 268-269)

Not only did these rulings improperly deny Mr. Ogle's explanation to the jury of the foundation for his beliefs, which would have negated the aspect of "corruptly" required by the statute, but the error of the ruling was compounded in its effect by another instruction given by the Court. In the supplementary instructions given by the Court to the jury on the First Amendment issue, the Court told the jurors, in pertinent part:

"However, if you find that the contents of the 'Handbook for Jurors', copies of which you will have with you as Exhibits 1 and 3-B, would influence a juror in his or her duties or would *impede or obstruct the due*

> *administration of justice,* then I instruct you that the First Amendment does not permit a person to distribute or endeavor to distribute such a 'Handbook for Jurors' to a juror sitting in a pending case in federal court." (Tr. of Instructions, p. 26) (Emphasis supplied)

Thus, the jury was told that they might convict upon either of the two theories:

> (a) If they found that the handbook would influence a juror,[6] or
>
> (b) If they found that the handbook would impede or obstruct the due administration of justice.

Since there was only a general verdict, there is no way of knowing if the jury convicted on the basis of the first theory, the second, or both. One thing is certain and that is that no one can say with any degree of certainty that Mr. Ogle's description of his independent research, and the authorities upon which he relied, might not have influenced the jury, in his favor, especially as to the second theory.

Not only did the trial court, upon objection by the prosecution, prevent Mr. Ogle from presenting his evidence to the jury on these matters, but at another point did so *sua sponte,* characterizing Mr. Ogle's testimony as a Fourth of July speech (Tr., pp. 264, 265). This occurred as Mr. Ogle was attempting to respond to his counsel's question pertaining to the First Amendment. Thereafter, the trial court recognized the First Amendment implications and submitted them to

---

[6]It should be noted here that this instruction did not require the jury to find that the contents of "Handbook for Jurors" would corruptly, unlawfully or wrongly influence a juror - all they had to find to bring a verdict of guilty was that the handbook would influence a juror.

the jury. But that same jury had heard the Judge state that Mr. Ogle's views were irrelevant and nothing but a Fourth of July speech.[7] Under these circumstances, Mr. Ogle was plainly entitled to have the jury hear his understanding of the applicable law *(United States v. Haigler,* 172 F.2d 986, 988 (10th Cir. 1949)).

The most succinct statement of the law on this point was made by the Supreme Court of Colorado:

> "It is axiomatic that a defendant in a trial on a criminal charge, can always be heard to advocate, and introduce evidence to support, the defense and justification claimed for the alleged unlawful acts."

(People v. Albrecht, 145 Colo. 202, 206, 358 P.2d 4, 7 (1960))

In evaluating the exclusion of this evidence, it is essential to consider that the Federal Rules of Evidence favor admission rather than exclusion of evidence, if it has any probative value at all *(United States v. Holladay,* 566 F.2d 1018, 1020 (5th Cir. 1978)). This evidence had probative value in that it showed the grounds of Mr. Ogle's beliefs, and would have tended to show that his actions were not motivated by an evil purpose. As such, it was prejudicial error to deny him the opportunity to present the same *(Buchanan v. United States,* 233 Fed. 257, 259 (8th Cir. 1916)). This rule is especially applicable where the jury must determine the defendant's state of mind in order to convict *(United States v. Herrera,* 600 F.2d 502, 504 (5th Cir. 1979)).

Even though the source of a witness' beliefs, might otherwise be inadmissible hearsay, the witness may never-

---

[7] "Where a court has expressed its opinion on a pivotal issue in the case, and has expressed that opinion in a strong, unequivocal and one-sided fashion, abstract instructions regarding the jury's role as fact finder are not a sufficient remedy."
(United States v. Anton, 597 F.2d 371, 375 (3rd Cir. 1979))

theless testify about utterances or writings, when the same is offered to establish his state of mind, rather than as proof of the truth of the matter stated *(4 Weinstein, Evidence,* Sec. 801(c)(01), pp. 801-70 - 801-72).

B. This Court should not allow approval of a deliberate attempt to destroy a witness by questioning designed to force that witness to claim her rights against self-incrimination in front of the jury.

Mrs. Lagoni's credibility was central to this case. If she were believed that Mr. Ogle did not ask or suggest to her that she contact Mrs. Hansen, then Mr. Ogle could not have been convicted even of the misdemeanor in 18 U.S.C. 1504, let alone the felony under 1503.

It would be difficult to imagine a situation where the prosecutor was on firmer notice that a question about the W-4 form would elicit a Fifth Amendment claim. At the very outset of the trial and before a jury had been impaneled, Mrs. Lagoni appeared with her attorney and this exchange took place:

> MR. RANSOM: May it please the Court, my name is William Ransom. I appear on behalf of the Lagonis. I represent them, and it is my understanding if asked about these W-4 forms that Mr. Nesland has referred to, they would assert their Fifth Amendment privilege.
>
> I think the government should be put on notice that with respect to any questions about their personal returns or W-4 forms, it is my understanding that they would assert their Fifth Amendment rights.
>
> THE COURT: All right, he is on notice.
>
> (Tr., p. 10)

A scant few hours later, the prosecutor, who had called Mrs. Lagoni to the stand, struck not only a hard blow, but a foul one:

Q. You testified that during the tax class you did have discussions about W-4 forms, is that correct?

A. We discussed that aspect, yes.

Q. And during the period of time that you took this class, did you change your W-4 form?

A. I would like to refuse to answer that on the grounds of my Fifth Amendment rights.

MR. SLIVKA: Your Honor, may we approach the bench?

THE COURT: All right.

AT THE BENCH

MR. SLIVKA: Your Honor, I believe this line of inquiry is totally improper, and Mr. Ransom, who is this witness' attorney, appeared this morning and informed counsel and informed the Court that if he pursued this line of questioning, he would advise his client and his client would in fact take the Fifth Amendment.

We believe it is improper from our understanding of the law and procedure for an attorney to ask a witness a question on the stand knowing in advance that they would take the Fifth Amendment.

MR. NESLAND: I don't believe she has a Fifth Amendment right with respect to that question. It

never entered my head she would have a Fifth Amendment right whether or not she changed or withdrew a W-4. If I offered her the form, that's another question.

THE COURT: That's right, she can change her form. Even my form isn't accurate. I don't claim being 65 years old and I give them a little extra each month. He can't go any further.

MR. SLIVKA: But, Your Honor, the inference is there.

THE COURT: Well, he is not going into it any more. I would just as soon that he hadn't gone into it, but I don't think it is that damaging. Don't go into it any further.

MR. NESLAND: Okay. (Tr., pp. 154-155)

It is inherently incredible that the prosecutor actually believed (and even more so that the trial court and the Court of Appeals supported him in this) that Mrs. Lagoni had no Fifth Amendment rights with regard to her W-4 forms. This entire case arose from the trial of Mr. Gigax for filing false W-4 forms. While the answer to this one question might not alone, have subjected Mrs. Lagoni to possible prosecution, had she answered that question she would have been subject to the rule that: "Disclosure of a fact waives the privilege as to details." *(Rogers v. United States,* 340 U.S. 367, 373 (1951); see also: *Malloy v. Hogan,* 378 U.S. 1, 11-12 (1964); and *In re Brogna,* 589 F.2d 24, 27 (1st Cir. 1978).

While the Government may impeach a witness, including its own, essential unfairness in such attempt is prohibited *(Schwab v. United States,* 327 F.2d 11, 167-177 (8th Cir. 1964)).

It must be observed that his question about Mrs. Lagoni's W-4's could not possibly have brought in any evidence relevant to the merits of the case. It was clearly and solely designed to impeach her in the eyes of the jury.

> "The layman's natural first suggestion would probably be that the resort to the privilege is a clear confession of a crime."

(8 Wigmore, Evidence, 3rd Ed., Sec. 2272, p. 426)

Essentially, the same thought and its result in a trial has been expressed in a leading case as:

> "When a witness claims his privilege, a natural, indeed an almost inevitable, inference arises as to what would have been his answer if he had refused. If the prosecution knows when it puts the question that he will claim the privilege, it is charged with notice of the probable effect of his refusal upon the jury's mind."

(United States v. Maloney, 262 F.2d 535, 537 (2d Cir. 1959))

Indeed, the organized bar has clearly denounced such a practice:

> "(c) It is unprofessional conduct for a prosecutor to call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of the privilege."

(ABA, Standards Relating to the Prosecution Function and Defense Function - Prosecution Standard 5.7(c))

It must be noted that at no time during the trial did the Court give any sort of cautionary instruction to the jury on

this incident. It must also be frankly stated that defense counsel did not ask for one. This may well have been deliberate trial strategy on his part since it has been wisely noted that such a cautionary instruction is really not helpful *(United States v. Maloney, supra)*.

Where, as here, the evidence was weak, and where, as here, the prosecutor knew in advance that the witness would claim her Fifth Amendment privilege, even a prompt cautionary instruction will not save the conviction *(United States v. King,* 461 F.2d 53, 57 (8th Cir. 1972); *Robbins v. Small,* 371 F.2d 793, 795-796 (1st Cir. 1967), cert. den. 386 U.S. 1033 (1967)).

In the face of such prosecutorial misconduct, the harmless error rule " . . . only operates to excuse error where evidence of the defendant's guilt is exceptionally strong and the error appears to have been harmless beyond a reasonable doubt." *(United States v. Miranda,* 593 F.2d 590, 596 (5th Cir. 1979)) In that case, the court held that despite a failure to object they would consider the error, and went on to hold:

> "And where, as here, we cannot say with certainty that a prompt curative instruction would have eliminated the prejudice, we resolve any doubts in favor of the accused and do not find the absence of an objection to be fatal." *(Id.)*

C. In light of the essential differences with regard to *mens rea* which the Congress incorporated in 1503 as compared to the requirements for conviction of 18 U.S.C. 1504, this Court should not allow the lower courts to rewrite 1503 so that evidence sufficient for a 1504 conviction is automatically sufficient for a 1503 conviction.

Again, as to this point it must be admitted that if the Court below was correct in its interpretation of the word "corruptly" this issue must fail.

In its effort to avoid having to reverse for a failure to prove and instruct the jury properly on "corruptly," the Tenth Circuit said that it meant merely "unlawful" (at 613 F.2d 238 and at 242).

Of course, if the jury believed that Mr. Ogle had attempted to have a copy of the "Handbook for Jurors" given to a sitting juror as an attempt to influence such juror, such would be unlawful because it would have been a violation of Section 1504.

Thus, if the Court of Appeals' holding that "corruptly" equals nothing more than "unlawfully" is correct, no purpose would be served by having the lesser offense of 1504 since every 1504 offense would also automatically be a corrupt endeavor and a violation of 1503. This is dubious since it violates the rules of statutory construction that:

> "It is well established that statutes will not be interpreted as though Congress enacted superfluous provisions."

(Conway County Farmers Assn. v. United States, 588 F.2d 592, 598 (8th Cir. 1978))

This Court has not looked with favor on cases in which the Government is able to prove violations of two separate criminal statutes with precisely the same factual showing *(Simpson v. United States,* 435 U.S. 6, 11 (1978)).

Such an expansive reading of a criminal statute, which would make proof of a violation thereof no more difficult than that of a misdemeanor not requiring the element of corruptly, is contrary to the rules of construction for criminal statutes *(United States v. Campos-Serrano,* 404 U.S. 293, 297 (1971)).

Of course, the Congress may deliberately denounce identical conduct in two different statutes, with different penalities, provided that the Congress makes proof of the same elements a requirement for a conviction of either statute *(United States v. Batchelder,* ___ U.S. ___, 47 U.S.L.W. 4611 (1979)). The Congress has done this with regard to some of the tax statutes (see *United States v. Bishop,* 412 U.S. 246, 350-362 (1973)), where in certain situations both the felony and the misdemeanor statutes require the same *mens rea,* "willfully." (The statutes involved are quoted at 412 U.S. 347-348). (Cf. *Spies v. United States,* 317 U.S. 492, 497-498 (1943)): and the excellent analysis on this point in *(United States v. Palermo,* 259 F.2d 872, 878-879 (3rd Cir. 1958))

In the case at bar, only 1503 requires that the attempt to influence be corruptly done, while 1504 only requires an attempt to influence a juror by writing to him or sending him a written communication.

To equate the two statutes is truly impermissible judicial legislation, and if this was the only error (out of a day and a half trial replete with errors), it would justify the grant of a writ and summary reversal.

D. Finally, and perhaps in the long run, the most important reason why a writ should be granted in this case, is to assure the public that even those who are accused of criticizing the judicial system, as we know it, will receive a full measure of due process of law, a scrupulously fair trial, and dispassionate, impartial appellate review.

In the words of this Court:

> "The operations of the courts and the judicial conduct of judges are matters of utmost public concern."

(Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 46 U.S.L.W. 4389, 4393 (1978))

and

"Justice must satisfy the appearance of justice."

(Offutt v. United States, 348 U.S. 11, 14 (1954))

It must be remembered at all times, especially in the consideration of a case such as this that the courts must "... be on guard against confusing offenses to their sensibilities with obstructions to the administration of justice." *(Brown v. United States,* 356 U.S. 148, 153 (1958))

There can be little doubt that many of the ideas expressed in the book, "Handbook for Jurors," must represent severe criticism of every person who today wears the judicial robe. Its philosophy is a throwback to the Magna Carta, the trial of John Peter Zenger on this continent, and the common law jury trials that were practiced during the early years of the Republic. Indeed, it was not until the decision of this Court in the last decade of the last Century that the rule, for the federal courts, was clearly laid down (over the vigorous dissent of Justices Gray and Shiras) that the judge was the absolute authority at trial of the law and that the jury's only proper function was to judge the facts *(Sparf and Hansen v. United States,* 156 U.S. 51 (1895)).

This petition is not one for the relitigation of the issues of *Sparf and Hansen*. It is mentioned only to demonstrate that there is respectable historical authority for the views which Mr. Ogle advocated, and that the advocacy of such views is not *per se* proof of a corrupt motive, nor is it a proper basis for denying fundamental due process rights. Among the most important of these is the proposition that a conviction cannot stand when evidence is missing as to an essential

element of the purported violation *(Vachon v. New Hampshire,* 414 U.S. 478, 480 (1974)).

Put another way, this Court has expressed the rule that:

> "Whatever the degrees of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

(Screws v. United States, 325 U.S. 91, 107 (1945))

As shown above that fundamental principle has been violated by the effective elimination of the requirement that the act be done "corruptly" in order to violate 1503. The elimination of this requirement is, at least in recent years, a Tenth Circuit deviation from the role enunciated by many other circuits as to this offense. Its application allows a conviction for a felony upon evidence which, if believed by the jury, would justify no more than a conviction for a misdemeanor.

The impression must not be allowed that such a result is permissible for a purported attack on the judiciary, when it would obviously be struck down in other circumstances.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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MAY 4, 1980

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May, 1980, three copies of the Petition for a Writ of Certiorari were mailed, postage prepaid, to: The Honorable Wade McCrea, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served, have been served.

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Attorney for Petitioner

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Tim Z. OGLE, Defendant-Appellant.

No. 78—1625.

United States Court of Appeals,
Tenth Circuit.

Nov. 1, 1979.

Rehearing Denied March 5, 1980.

Defendant was convicted before the United States District Court for the District of Colorado, Alfred A. Arraj, Senior District Judge, of knowingly and corruptly endeavoring to influence, impede and obstruct the due administration of justice in a case pending in United States District Court, and he appealed. The Court of Appeals, William E. Doyle, Circuit Judge, held that: (1) instruction on word corruptly was not deficient for failure to include reference to an evil motive; (2) conviction was supported by evidence, including evidence that defendant attempted to get into one juror's hands a hand book teaching that tax crimes are not true crimes and that it was unnecessary for jurors to follow the law of the land where they conceive that the law is contrary to their concepts of morals; (3) mere good-faith belief in unconstitutionality of income tax laws was not a good defense.

Affirmed.

1. Obstructing Justice § 6

For purpose of statute making it an offense to knowingly and corruptly endeavor to influence, impede and obstruct the administration of justice, an endeavor to influence a juror in performance of his or her duty is per se unlawful and is tantamount to doing the act corruptly. 18 U.S. CA. § 1503.

2. Obstructing Justice § 6

Force or threats need not be used before there is a corrupt effort to influence a juror for purpose of offense of knowingly and corruptly endeavoring to influence, impede and obstruct the due administration of justice. 18 U.S.C.A. § 1503.

3. Obstructing Justice § 6

Term "corruptly," as used in statute making it an offense to corruptly endeavor to influence, impede or obstruct due administration of justice, does not superimpose a special and additional element of the offense such as a desire to undermine the moral character of a juror; rather, it is directed to the effort to bring about a particular result such as affecting the verdict of a jury or the testimony of a witness and such is per se an obstruction of justice. 18 U.S.C.A. § 1503.

4. Obstructing Justice § 18

Failure to include reference to evil motive in defining word "corruptly," in prosecution for attempting to corruptly influence a juror, was not fundamental error since if jury believed the evidence indicating that defendant attempted to deliver to a juror a handbook espousing his belief that a juror is empowered to acquit where he feels that the law is unfair, his motives were inherently evil and it was not

necessary to so specifically inform the jury, and all that the jury had to find was that there was a corrupt endeavor which was an effort to wrongfully influence the juror. 18 U.S.C.A. § 1503.

5. Obstructing Justice § 16

Evidence on issue of whether defendant, charged with corruptly endeavoring to influence a juror, acted corruptly by attempting to distribute to juror a handbook emphasizing defendant's views that a juror is empowered to acquit where he feels that the law is unfair or infringes on fundamental rights was sufficient to support conviction. 18 U.S.C.A. § 1503.

6. Obstructing Justice § 15

Refusal to allow defendant, charged with corruptly endeavoring to influence a juror by attempting to distribute a handbook representing defendant's views on concept of jury nullification, to repeat that he did not intend to influence the juror was not error since defendant was not precluded from presenting his theory and questions to which objections were sustained were merely repetitive. 18 U.S.C.A. § 1503.

7. Obstructing Justice § 15

It was not error to curtail attempts of defendant, charged with corruptly endeavoring to influence a juror by attempting to distribute to her a handbook esposing defendant's view of jury nullification, i.e., that if a juror's conscience dictated against enforcement of a particular law he could vote for acquittal, to explain the research and study which were the basis of his beliefs since defendant's views were entirely contrary to law and were merely a variation of the unacceptable concept that individual good faith is a complete defense. 18 U.S.C.A. § 1503.

8. Criminal Law § 829(3)

Requested instruction that word "corruptly," as used in offense of corruptly endeavoring to influence a juror, meant an endeavor, done with a wicked or evil purpose, to influence a juror in performance of his or her duties or to influence, obstruct or impede the due administration of justice unless specific intent to impede or influence was essential element of the offense was properly refused, in view of instruction given. 18 U.S.C.A. § 1503.

9. Obstructing Justice § 6

Evil purpose in the sense of a fiendish motive is not a necessary element of offense of knowingly and corruptly endeavoring to influence, impede and obstruct the due administration of justice, such as by attempting to influence a juror. 18 U.S.C.A. § 1503.

10. Criminal Law § 1038.1(4)

Instruction to effect that what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged and that it is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted, with the court informing the jury that they may draw the inference that the accused intended the natural results of acts he knowingly did or failed to do, was not plain error.

11. Criminal Law § 759(1)

An instruction allowing the jury to draw a permissive inference from a basic fact is not objectionable since it involves a process which is nothing more than the deductive reasoning that is employed in the consideration of all circumstantial evidence; allowing the jury to pursue a deduc-

tive process on a permissive basis is far different from advising the jury that the law presumes that a person intends the ordinary consequences of his voluntary acts, as the latter form reverses the burden of proof, while the former does not.

12. Criminal Law § 805(3)

There was no error, in prosecution for corruptly endeavoring to influence a juror by attempting to distribute to her a handbook espousing defendant's view of "jury nullification," in omitting word "corruptly" in instructing on defendant's First Amendment rights since the term, in its proper context, was used in the instruction and the court gave a sufficient definition thereof. 18 U.S.C.A. § 1503; U.S.C.A. Const. Amend. 1.

13. Criminal Law § 706(3)

Prosecutor's inquiry of principal witness whether she changed her W-4 form while she took defendant's tax class, whereon witness asserted Fifth Amendment privilege, did not require mistrial on ground of prosecutorial misconduct absent showing that prosecutor realized that the witness would assert the privilege in response to the question. U.S.C.A. Const. Amend. 5.

14. Criminal Law § 31

Conscientious belief that a law is unconstitutional or contrary to the common law is no defense to a criminal charge; hence, a defendant's belief that the Sixteenth Amendment validating the federal income tax was unconstitutional was no defense to charge of attempting to corruptly influence a juror sitting in a tax case by attempting to distribute to her a book teaching that tax crimes are not true crimes and espousing defendant's view of "jury nullification," i.e., that a juror may acquit when he feels that the law

is unfair and infringes on fundamental rights. 18 U.S.C.A. § 1503; U.S.C.A. Const. Amend. 16.

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Richard N. Stuckey, Asst. U.S. Atty., Denver, Colo. (Joseph F. Dolan, U.S. Atty., and James E. Nesland, Asst. U.S. Atty., Denver, Colo., of counsel, on the brief), for plaintiff-appellee.

Irvin M. Kent, Denver, Colo. (Arthur R. Karstaedt, III, Denver, Colo., on the brief), for defendant-appellant.

Before HOLLOWAY and DOYLE, Circuit Judges, and BOHANON,* Senior District Judge.

WILLIAM E. DOYLE, Circuit Judge.

The defendant-appellant seeks reversal of a judgment of conviction which was entered on June 15, 1978, in the United States District Court for the District of Colorado. The indictment described a violation of Title 18 U.S.C. § 1503.[1] Thus, the defendant was accused of knowingly and corruptly endeavoring to influence, impede and obstruct the due administration of justice in a case then pending in the

*Of the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

[1]The indictment alleged that:

> On or about February 21, 1978, in the state and District of Colorado, defendant, TIM Z. OGLE, aided and abetted by Jacquelyn C. Lagoni, not named herein as a defendant, willfully, knowingly and corruptly endeavored to influence, obstruct and impede the due administration of justice in the case of *United States of America v. Norman A. Gigax,* Criminal Case No. 78-CR-3, which was then pending before the United States District Court for the District of Colorado, in that TIM Z. OGLE did endeavor to communicate and caused to be communicated with Colleen Hansen, a petit juror in said case, and did endeavor to deliver to said petit juror a pamphlet entitled "Handbook for Jurists," all in violation of Title 18, United States Code, Section 1503.

United States District Court. A further specific allegation identified Colleen Hansen as a juror in a case then being tried and stated that he endeavored to deliver to her a pamphlet called "A Handbook for Jurors."

There are two fundamental questions which go to the crux of the case. First, whether, in fact, the defendant, Ogle, had endeavored to communicate with the juror, Colleen Hansen. This question, being one of fact, was resolved by the jury, and the only appellate issue is whether the evidence is sufficient to justify its submission to the jury. The second question is whether he endeavored to deliver to Mrs. Hansen the pamphlet entitled "A Handbook for Jurors." The government's theory is that he had endeavored to do this through an agent, Jacquelyn Lagoni. The question of law which threads through the entire case and which is raised in various ways by the appellant is whether a belief by the defendant, subjective in nature, as to the validity of a law, constitutes a justification for his taking action which would effectively nullify it.

At the times in question, Ogle was a pilot for Continental Airlines. Two of the witnesses in this case, Colleen Hansen, the juror, and Jacquelyn Lagoni, the important witness, were stewardesses for Continental Airlines and were well acquainted with Ogle. Jacquelyn Lagoni had made flights on planes which Ogle had been piloting. Also, she and her husband, William Lagoni, had attended a several weeks' course which was conducted by Ogle. This course was variously described as being one in good citizenship which centered around the Constitution, the Bill of Rights and our system of government. The textbook used in this course had been written by the defendant Ogle and was entitled "Good Citizenship with Constitutional Tax Return and Procedures," Exhibit 2. There was also a pamphlet which was a small version of the mentioned book. It was entitled "A Handbook for Jurors," Exhibit 1.

The tax return book advised that the jury was more powerful than all three branches of the government combined, and that after jurors are armed with the Constitution and are aware of their power, they have the final authority to acquit one of their fellow citizens accused of a crime that the jurors do not consider to be a crime based on their consideration or determination of the justice of the law. This is described as the jury's right of nullification. The book goes on to say that this is a protection against unjust laws and that the verdict of the jury cannot be challenged or retried or overturned by any higher court. It further says that a juror has more power than the President of the United States, the United States Congress, and the United States Supreme Court.

Much of the book's space is addressed to tax matters. It tells the reader how to make out the income tax return with a view toward convincing a potential jury of their good faith in obeying the law. Use of attachments such as Honorable Discharge from the service, evidence of civic service, letters to Congress and clippings from newspapers is advocated. It sets forth an income tax return which is filled out in blank with asterisks. It seeks to establish that the Sixteenth Amendment validating the federal income tax is subject to being itself declared unconstitutional. Included is an affidavit of insufficient income which reads: I swear, under penalty of perjury, that the income I received in 19 ____ was less than $750 *statutory dollars*, as I understand that term. Signed _____" (Emphasis supplied.)

The pamphlet, "A Handbook for Jurors," teaches that tax crimes are not true crimes and that it is unnecessary for jurors to follow the law of the land where they conceive of the law being contrary to their concepts of morals. The book also teaches that a juror is empowered to determine if a law under which a person is charged is contrary to the Constitution or common law and acquittal is appropriate. The em-

phasis in the handbook is that the juror is empowered to acquit where he feels that the law is unfair or that it infringes on fundamental rights.

The trouble started when Colleen Hansen, a stewardess for Continental Airlines, was empaneled as a juror in a case against one Norman Gigax, who had been involved in the tax protest movement and was on trial for filing a false W-4 employee withholding form. Ogle, as we have previously mentioned, also had an intense interest in this tax protest movement in that he conducted the school and wrote the literature which was used in the classes. He was present at the trial of Gigax and recognized Mrs. Hansen, who was a stewardess for Continental Airlines. Also, on the first day that he was at the trial, he had some brief communication with Mrs. Hansen in the elevator. That same evening, Ogle contacted Jacquelyn Lagoni by telephone. She was not only a stewardess for Continental Airlines, she was also a student of Ogle's in the tax course and was a personal acquaintance of Mrs. Hansen's. This telephone communication was made by Ogle from the auditorium where he had been a spectator at some tennis matches which were being played there.

The conversation between Ogle and Mrs. Lagoni, according to the latter, pertained to whether or not Mrs. Hansen had a copy of the booklet entitled "A Handbook for Jurors," which discussed and advocated the concept of jury nullification. Shortly after this conversation, Lagoni called Mrs. Hansen and revealed that she knew that Mrs. Hansen was a juror on the *Gigax* case, and that Mrs. Lagoni told Mrs. Hansen, as a result of inquiry by the latter, that Ogle had been the source of her information. Mention was made of the pamphlet "A Handbook for Jurors," and Mrs. Hansen was asked if she would like to have a copy. Moreover, Mrs. Lagoni offered either to have Ogle deliver a copy or to deliver a copy herself. Mrs. Hansen refused the offer and reported the incident to the judge.

Immunity was offered to Mr. and Mrs. Lagoni in return for their cooperation at trial. They accepted this, but informed the judge that they intended to invoke their Fifth Amendment privilege against self-incrimination if they were asked any questions about their personal return. It was on this basis that they were called as witnesses.

The theory of the prosecution's case was that Ogle's telephone call to Mrs. Lagoni was part of an attempt to communicate to her his desire that the pamphlet mentioned above, "A Handbook for Jurors," should be delivered to Mrs. Hansen. The government also contended that this was an effort by Ogle to manipulate Mrs. Hansen's actions as a juror.

Ogle enumerates a number of errors as a basis for reversing the judgment of the trial court:

1. He contends that the trial court erred in refusing to allow him to testify that he had no intention of influencing a juror, which refusal of the trial court would leave the jury with the impression that intent was unimportant to a decision in the case. An objection to questions asked on redirect examination concerning Ogle's intent to influence the jury was sustained. The government's response is that Ogle did testify regarding his lack of intent on direct examination and there was no need for him to repeat it on redirect. The argument is that the objection on redirect was valid because the evidence was repetitive. Ogle's position is that the issue of intent was explored on cross-examination and that he had a right to again assert on redirect that he had no such intent so as to prevent confusion.

2. Ogle criticizes an instruction of the court defining "corruption" as used in the statute. The court told the jury that "corruptly" means any endeavor to influence a juror in the performance of his or her duties or to influence, obstruct

or impede the due administration of justice. He argues that reference to evil or wicked purpose should have been included in the definition and that its absence effectively eliminated the corrupt element of the crime. He maintains that the word "corrupt" means something that is especially diabolic, above and outside the letter and spirit of the law.

The government's argument in response to this is that the instructions considered as a whole clearly bring home to the jury the fact that specific intent requiring a bad motive is an element of the crime. A Tenth Circuit case is cited to prove the propriety of the definition of "corrupt" which was given by the judge. This was *Broadbent v. United States*, 149 F.2d 580 (10th Cir. 1945).

3. The next point is that the trial court committed error in refusing to allow Ogle to testify as to the materials he studied and relied upon in arriving at his convictions which were set forth in "A Handbook for Jurors." His position was that such testimony would have aided him in showing the jury that he did not have a corrupt motive; that it was in good faith, undoubtedly.

The government responds that the testimony is irrelevant and that Ogle's defense was that the phone call to Lagoni was not intended to get her to make any further communication to the juror, not that such communication was made in good faith and therefore not corrupt. They also argue that even if such a defense had been made, it would have been to no avail because the genuineness of Ogle's belief and his ideas in the book do not constitute a legal defense to the charge.

4. Ogle maintains that it was error for an instruction concerning the effect of the First Amendment to omit the word "corruptly" from the description of the activity forbidden. The instruction was not objected to at the trial. It is

also claimed that there was error in the instruction given concerning the proof of specific intent. Again, no objection was made at trial.

5. Ogle requests a new trial based upon the alleged misconduct of the prosecutor in asking Mrs. Lagoni whether she changed her W-4 form. She claimed the Fifth Amendment privilege. The claim is that this was a deliberate effort to discredit Lagoni in an impermissible way, and that the government knew very well that she was going to invoke the Fifth Amendment privilege if some mention was made in her questioning as to her own personal return.

The government's answer is that the Fifth Amendment was not properly invoked in this instance and therefore the prosecutor was not at fault. The goverment calls attention to the fact that a mistrial was not requested when the incident occurred at trial.

6. Ogle further maintains that he is entitled to a reversal based on lack of effective assistance of counsel. He points to failures to make objections and form an adequate record for appeal by the trial attorney. An issue was raised as to what standard is to be applied to determine when counsel is incompetent. Note: There is no evidence whatever that there was incompetent counsel. The representation was found by Judge Arraj to have been highly adequate, and from our view of the record we agree with this appraisal.

7. Ogle raises an issue as to whether the trial court committed error in refusing to conduct an evidentiary hearing into alleged jury misconduct. The claim is supported by affidavits of persons who had been in the courtroom during trial.

A government agent seated at the prosecution table is alleged to have been contacted by the juror.[2]

I.

THE INSTRUCTION DEFINING THE WORD "CORRUPTLY"

We first consider the argument that the trial court misinterpreted and misapplied 18 U.S.C. § 1503 and in doing so effectively eliminated the word "corruptly" from the statute.

The trial court concluded and instructed the jury that "corruptly" was used in the present context as being an " * * * endeavor to influence a juror in the performance of his or her duties, or to influence, obstruct or impede the due administration of justice." It is contended that this was a fundamental error and that it should have included reference to an evil motive, something bad, wicked, or having an evil purpose.

[1] Volume I of Bouvier's Law Dictionary defines the term "corruption" as follows: "An act done with an intent to give some advantage inconsistent with official duty and rights of others." The author continues: "It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another. Something against law; as a contract by which the borrower agreed to pay the lender his interest. It is said, in such case, that it was corruptly agreed, etc." This,

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[2]We find that the judge did not err in his handling of this matter. Based upon affidavits, the judge determined that there was not actually any contact. An effort was made to make a mountain out of a molehill. We find nothing to even discuss.

then, is the common definition. It really means unlawful, and this is the way that Judge Arraj interpreted it and put it in terms of the facts of this case. In other words, he said that an endeavor to influence a juror in the performance of his or her duty or to influence, obstruct or impede the due administration of justice is per se unlawful and is tantamount to doing the act corruptly. We approve fully the trial court's interpretation.

The basic fact issue in this case is whether the defendant obtained the services of Mrs. Lagoni as an agent to contact the juror, Mrs. Hansen, and endeavored to have a copy of the pamphlet "A Handbook for Jurors" delivered to her. The government maintains that this was actually done and that this and other corroborative acts of the defendant show that he intended to influence the conduct of the juror, Mrs. Hansen. Defendant, on the other hand, had a theory of his own. He claims he was merely calling Mrs. Lagoni for the purpose of discussing other matters and that he did not really seek to contact Mrs. Hansen. This, of course, is a conflict in the evidence which has to be resolved by the jury.

[2] But the defendant has still another theory, a legal one, which is found in his contention that in order to have a condition in which there is a corrupt effort to influence a jury that force or threats have to be used; that a mere attempt would not be sufficient. We disagree. In the present context it is a question whether he actually endeavored to influence or impede justice.

On the meaning of the term "corruptly," this circuit has spoken in *Broadbent v. United States, supra.* This 1945 decision of this court was handed down in relationship to a charge of corruptly endeavoring to influence a witness. The question was whether the evidence was sufficient. The defendant had made promises to the witness of financial security and had made threats of character defamation. The

court said that the evidence in support of this charge, endeavoring to influence a witness or to impede and obstruct justice, falls within the connotation of the word "corruptly." The court said that the statute was designed to protect witnesses in federal courts and to prevent a miscarriage of justice by corrupt methods. The court acknowledged that "corruptly" was subject to other meanings, but that in the present context, one similar to that which we have at bar, included, according to the opinion, "any endeavor to influence a witness or to impede and obstruct justice."

[3] Thus, the view that this court has taken and which most of the other courts have taken is that the term "corruptly" does not superimpose a special and additional element on the offense such as a desire to undermine the moral character of a juror. Rather, it is directed to the effort to bring about a particular result such as affecting the verdict of a jury or the testimony of a witness as in *Broadbent*. This is *per se* an obstruction of justice and was so recognized in *Broadbent* and by the trial court in this case. The trial court's legal view of this was correct.

[4] Counsel for appellant argues that both *Bosselman v. United States,* 239 F. 82 (2d Cir. 1917), and *United States v. Polakoff,* 121 F.2d 333 (2d Cir. 1941), involved inherently evil motives. No doubt. But if the jury believed the evidence in this case, the motives were inherently evil and it was not necessary to tell the jury that they were evil. All that they had to find was that there was a corrupt endeavor which was an effort to wrongly influence the injury.

[5] The defendant also argues that the evidence is legally inadequate to establish that the defendant acted corruptly. However, if the jury believed the testimony of Mrs. Lagoni and that of Mrs. Hansen with respect to their conversations with the defendant and with one another, the evidence cannot be said to be insufficient. The defendant went

into court and was given permission by the judge to take notes, and according to Mrs. Hansen he caught her eye. This, in addition to the testimony of Mrs. Lagoni, which has been detailed above, supports the conclusion that he sought to influence her decision in the case, particularly if the jury believed that he was seeking to get a copy of the pamphlet "A Handbook for Jurors" into her hands. The inference could flow from all of this that there existed an intent on the part of Ogle to willfully and corruptly obstruct and impede the due administration of justice. The jury was, of course, at liberty to accept the testimony given by Mrs. Lagoni and Mrs. Hansen and to reject that of the defendant that he was merely calling in order to rearrange a dinner engagement.

II.

REFUSAL OF THE COURT TO ALLOW THE DEFENDANT TO REPEAT THAT HE DID NOT INTEND TO INFLUENCE A JUROR

On the question of his intent, the defendant was asked whether he had ever advocated handing this pamphlet out to individuals on jury duty. He said that he had. He was then asked whether he believed the purpose of the pamphlet was to influence a jury in any way as to how they should vote in a particular case, to which he answered "No, I do not believe that that is the purpose of the book at all." He was asked whether he had advocated that the pamphlet be handed out to jurors, and he said that he did not recommend it at the present time because of the confusion, and added that "I have withdrawn my recommendation that it be handed to jurors."

The defendant stated his understanding of the pamphlet as shown below.[3]

He then proceeded to discuss his idea of jury nullification as explained in the pamphlet, his theory being that a juror is not required to follow the law if he disagrees with it, and that jurors are free to resort to some higher sense of morality. He was also asked whether in talking to Mrs. Lagoni he did not attempt to contact Colleen Hansen, who was then a juror in the *Gigax* case, for the purpose of influencing her decision in that trial. He also said that he did not call Jacquelyn Lagoni for the purpose of having her see if she could influence the juror, Colleen Hansen. He conceded on redirect examination that he had asked Mrs. Lagoni whether she knew Colleen Hansen.

The defendant was asked by his counsel (on redirect examination) whether on the night of February 21, he took any action designed to influence Colleen Hansen with respect to the *Gigax* case. Objection was made by the United States Attorney, and the court sustained the objection. Counsel for the defendant then asked whether when he called Jacquelyn Lagoni on the night of February 21, 1978, he did so with the intent of influencing Colleen Hansen in the exercise of her duty. This was objected to by the United States Attorney, and the court sustained it. He then testified that he has called Lagoni for two reasons, first, to discuss the dinner plans, and, second, to satisfy his curiosity whether or

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[3]"Well, my understanding of the pamphlet is that it encourages people to use their own sense of conscience and their own sense of justice in arriving at verdicts, whether it is a verdict to acquit or a verdict to convict, but, in either case, a jury, I think the primary function of a jury, the way that I understand this book, is to use their own sense of morality, their own sense of conscience in arriving at their decisions, so that we can then use the people through their function in the jury box as a tempering influence on our overall system of justice in this country."

not Colleen had seen his little handbook. Defendant was allowed to discuss at some length one of his other books, "Good Citizenship with Constitutional Tax Return and Procedures," government's Exhibit 2, which he explained was an alternative to filing a regular tax return.

[6] We have detailed the testimony of the defendant in an effort to ascertain whether he suffered prejudice as a result of the trial court's ruling which sustained objections as to his testifying regarding his intent. Our conclusion is that he was allowed to testify extensively as to what his motive and his intent were, and he was allowed to say that he did not seek to influence the juror, Mrs. Hansen. In view of the broad presentation that was made by him and on his behalf, we fail to see prejudice as a result of the sustaining of objections to questions which called for answers which summarized the evidence and reiterated his lack of intent to influence the juror. Since this was his entire theme, the court acted within its discretion in sustaining the objections to the two repetitive questions in controversy.

III.

THE CONTENTION THAT THE COURT ERRED IN SUSTAINING OBJECTIONS OF THE U.S. ATTORNEY TO QUESTIONS WHICH WOULD HAVE ALLOWED THE DEFENDANT TO EXPLAIN THE RESEARCH AND STUDY WHICH FORMED THE BASIS FOR HIS BELIEFS

[7] Ogle was allowed to explain his beliefs to some extent, but the trial court cut him off after a certain point. The whole purpose of the small pamphlet, "A Handbook for Jurors," was to persuade the juror that if his conscience dictated against enforcement of the particular law, that the Constitution and nature of the jury system allowed him to

vote for acquittal regardless of what the law said. As we mentioned above, he said that he had changed his policy and no longer recommended distribution to jurors. He explained his understanding of the pamphlet as being to encourage people to use their own sense of conscience and their own sense of justice in arriving at verdicts, whether it is a verdict to acquit or a verdict to convict, but in either case "the primary function of a jury, the way that I understand this book, is to use their own sense of morality, their own sense of conscience in arriving at their decisions, so that we can then use the people through their function in the jury box as a tempering influence on our overall system of justice in this country."

It is not surprising that the court stopped this line of questioning because it is entirely contrary to law. Any system must be based upon upholding the law. To empower each individual to decide whether the particular law is worthy or runs against the individual's private beliefs would necessarily produce a lawless society and chaos. Quite apart from the fact of invalidity of such a system, it has no practical social value. Such a government would fail in a very short time, for carried to its logical conclusion it is anarchy and revolution. The revolutionary government would not abolish taxes.

This concept is merely a variation of the idea that individual good faith is a complete defense. This is not accepted either, and neither defendant nor his counsel maintain that subjective good faith is a defense to the commission of a crime. Nevertheless, they use this individual conscience analysis in an attempt to disguise the good faith.

In summary, the efforts of the defendant to extend his testimony after having made his explanation were properly curtailed. Judge Arraj had been liberal in allowing him to restate theories to the point that no one present could have failed to understand his premise. The judge did on one occa-

sion mention that he did not want him to present a Fourth of July speech. This characterization was not inaccurate in that the speech offered was not based upon our law or upon our system of government. In other words, our system is one of laws and not of men.

IV.

THE REJECTION BY THE TRIAL COURT OF TENDERED INSTRUCTION NUMBER 4, WHICH CONTAINED THE DEFENDANT'S DEFINITION OF THE TERM "CORRUPTLY"

The tendered instruction mentioned is as follows:

> The word "corruptly" means an endeavor, done with a wicked or evil purpose, to influence a juror in the performance of his or her duties or to influence, obstruct or impede the due administration of justice. Specific intent to impede or influence a petit juror or to impede or obstruct the administration of justice is an essential element of the offense here charged.

The argument of appellant that the court erred in not giving his tendered instruction is that the above-quoted instruction was his theory of the case. While he concedes that the judge did not have to give the exact language, he claims the judge was required to embody his theory in an instruction. The instruction given was not substantially different from that which was requested. The court defined the key words in the charge as follows: "Now, the word "endeavor" means any effort to attempt to accomplish the evil purpose that the statute was designed to protect, and the word "corruptly" means any endeavor to influence a juror in the performance of his or her duties or to influence, obstruct or impede the due administration of justice, and the term "due administration of justice" contemplates and imports a

free and fair opportunity for every litigant in a pending case to have a just and honest trial without outside corrupting influences."

[8, 9] We hold that the court's instruction sufficiently advised the jury on the subject. As we pointed out above, the term "corruptly" in this present context, at least, means acting illegally or unlawfully. The defendant is seeking to add to that by requiring, in addition, a wicked or evil purpose. The court's instruction used the term "evil," but limits it to the endeavor to accomplish that which the statute was designed to protect rather than evil purpose in the sense of a fiendish motive. Such a motive is not a necessary element of the crime. The instruction would, had it been given, have been potentially confusing to the jury.

The trial court's instruction was that which was adopted by Devitt & Blackmar, Federal Jury Practice and Instructions (3rd ed. 1977), § 32.05. Contrary to counsel's contention, *United States v. Partin,* 552 F.2d 621 (5th Cir. 1977), does not modify the original Devitt & Blackmar version. The case was merely cited in the pocket part of Devitt & Blackmar for information. The defendant in *Partin* objected to the form of the instruction. The court held that it was not plain error. The Court of Appeals for the Fifth Circuit did not endorse the instruction. Contrary to that which the appellant maintains, the refusal of Judge Arraj to include the words "evil, bad motive and evil or wicked purpose" was not, in our opinion necessary.

V.

THE INSTRUCTION ON INFERRED INTENT

It is next urged that the trial court committed error by giving an instruction to the effect that what a defendant does or fails to do may indicate intent or lack of intent to commit

the offense charge, and it is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. The instruction informs the jury that they may draw the inference that the accused intended the natural results of acts he knowingly did or failed to do.

Counsel has conceded that there was no objection made to the giving of this instruction. *See United States v. Tijerina,* 407 F.2d 349, 355 (10th Cir. 1969), and *United States v. Woodring,* 464 F.2d 1248, 1251 (10th Cir. 1972). Under these cases, the plain error test was held to have been applicable. Counsel says that we should establish a rule that the giving of the instruction, even though attended by a proper instruction on burden of proof, is error regardless of whether there was objection. He relies on the Fifth Circuit case of *Mann v. United States,* 329 F.2d 404 (5th Cir. 1963).

The fact that there was no objection made, of course, weakens the position of the defendant-appellant. There is another factor which should be mentioned. The Supreme Court at the last term in *Sandstrom v. Montana,* ___ U.S. ___ , 99 S. Ct. 2450, 61 L.Ed.2d 39, (1979), considered an instruction which was somewhat similar but, at the same time, very different. There the trial court in a homicide case instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The Supreme Court pointed out that this was given over the petitioner's objection and that such instruction had the effect of shifting the burden of proof on the issue of purpose or knowledge. The defendant was found guilty, and the conviction was affirmed by the Supreme Court of Montana. The Supreme Court of Montana recognized the evil of shifting the burden of proof by means of a presumption. However, the Montana court ruled that the instruction did not violate due process standards. The Supreme Court, however, condemned the instruction, citing its opinions in *United States*

Gypsum Co., 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). It held that since the jury may have interpreted the instruction as mandatory, the giving of it was a violation of the petitioner's constitutional rights. The basic premise for the decision was that the giving of an instruction requiring the jury to presume from a proven fact, the existence of another fact as to an element of the offense overrides presumption of innocence.

[10, 11] In our view, *Sandstrom v. Montana, supra,* is clearly distinguishable from the case at bar so that we need not base our decision on the proposition of alleged plain error. The instruction in our case simply allowed the jury to draw a permissive inference from a basic fact, a process which is nothing more than the deductive reasoning which is employed in the consideration of all circumstantial evidence. To allow the jury to pursue a deductive process on a permissive basis is far different from advising the jury that the law *presumes* that a person intends the ordinary consequences of his voluntary acts. The latter form reverses the burden of proof, the former does not.

VI.

OMMISSION OF "CORRUPTLY" FROM FIRST AMENDMENT INSTRUCTION

[12] We next consider the further contention of the defendant that it was error to omit the word "corruptly" in instructing the jury on the defendant's First Amendment rights.

In connection with the First Amendment, the court finally instructed the jury that whether there was First Amendment protection for the distribution of "A Handbook

for Jurors" pamphlet depended on whether the contents would influence the jury. It is argued that the term "corruptly" should have been put in. However, the term "corruptly" in its proper context was used in the instruction and the court gave its definition of it which we have held to be sufficient.

We find no error in this instruction.

VII.

CLAIM OF FIFTH AMENDMENT PRIVILEGE

[13] The next contention is that the district attorney improperly asked Mrs. Lagoni whether they discussed in the defendant's tax class the W-4 forms. She said "Yes." The district attorney continued "And during the period of time that you took this class, did you change your W-4 form?" She said "I would like to refuse to answer that on the grounds of my Fifth Amendment rights." Counsel for the appellant maintains that this was a deliberate effort to bring about a Fifth Amendment claim on the part of the witness. The trial court ruled to the contrary. The U.S. Attorney said "I don't believe she has a Fifth Amendment right with respect to that question. It never entered my head she would have a Fifth Amendment right whether or not she changed or withdrew a W-4." The court said "That's right, she can change her form. Even my form isn't accurate. I don't claim being 65 years old and I give them a little extra each month. He can't go any further." The court added further, after the defense counsel objected, "Well, he is not going into it any more. I would just as soon that he hadn't gone into it, but I don't think it is that damaging. Don't go into it any further."

There is no reason to believe that the U.S. Attorney realized that she would use this claim in response to the question asked. That being the case, we disagree with the

present argument that this was asked for the purpose of having her claim privilege in open court before the jury. The trial judge believed that counsel did not expect the answer, and we do not agree that the ruling of the trial court constituted error.

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[14] Finally, there is a considerable body of law which holds that mistaken belief in the unconstitutionality of a law is not a good defense in a criminal action. A brief annotation which is reported in 61 A.L.R. 1148, 1154 deals with the question whether a mistake of law is a defense in a criminal case. It holds that it is not. This annotation is a note to the Tennessee case of *Hunter v. State*, 158 Tenn. 63, 12 S.W.2d 361. In *Hunter*, a public officer believed that a statute which deprived him of fees of his office to which he had been formerly entitled was unconstitutional. He set up this belief as a defense to a charge of embezzlement growing out of his conversion of the fees in acordance with the prior custom. The Tennessee court refused to accept his contention. The court recognized that mistake of fact is capable of constituting a defense, whereas a mistaken belief as to the law can never justify the commission of a crime. The court said that the authorities uniformly recognize and give effect to this distinction, sometimes excusing the accused in a fact situation, but refusing always to do so in the law area. The court said the claim of belief in the unconstitutionality of the law comes within the latter class. It is a plea of ignorance of the law which is never admissible to excuse crime.

The note cited declares:

> It is generally held that mistaken belief in, or reliance upon, the unconstitutionality of a statute, is no defense to a criminal prosecution.

61 A.L.R. 1154.

A number of other cases are annotated. One which is very much in point here is *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1878). In *Reynolds*, it was held that although freedom of religion is guaranteed by the Constitution, religious belief was not a valid defense in a prosecution for bigamy. Reliance was on the religious belief itself. In ruling that a religious belief could not constitute a defense, the Court explained its decision in this way: that a criminal intent is generally an element of a crime, and every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here, the accused knew that he had been married and that his first wife was living. He was also aware that there was a law that prohibited his having a second wife. Under those circumstances,the Court said that he was guilty of the crime, and that while ignorance of a fact could sometimes be taken as evidence of a want of criminal intent, ignorance of the law could not. The Supreme Court continued that the only defense of the accused in the case before it was his belief that the law ought not to have been enacted. The Court finally concluded: "It matters not that his belief was part of his professed religion; it was still belief and belief only." When the offense consists of a positive act knowingly done it would be dangerous, the Court said, to hold that the offender might escape punishment because he religiously believed the law he knowingly broke ought never to have been made. "No case, we believe, can be found that has gone so far."

A Tenth Circuit case, *Warren v. United States*, 177 F.2d 596 (10th Cir. 1949),*cert. denied*, 338 U.S. 947, 70 S.Ct. 485, 94 L.Ed. 584 (1950), in an opinion by Chief Judge Phillips, ruled that membership in the Unitarian church, the doctrine of which was believed by the defendant to oppose war, did not constitute a defense to charges that the defendant had advised his stepson not to register for the draft as required by law. The defendant testified that he believed war to be a great evil, that without compulsory military training war

could not be carried on, and that war could be prevented if the draft were not enforced. He also said that he believed certain laws to be detrimental to man as a whole and that they therefore should be disobeyed. He was shown to have frequently instructed his stepson as to moral, social and religious matters in accordance with his beliefs. He admitted that he advised his stepson not to register and told him that he should go to Canada and that he would pay his expenses. This court rejected the contention of the defendant that he had the right and duty to give his stepson religious training and instruction and good faith to teach him that war was wrong and that registration is likewise wrong. The court concluded, however, that the First Amendment did not justify his counseling his stepson to refuse or to evade registration.

The court said:

> It is one thing for a person to entertain religious beliefs, to express those beliefs, and to teach them to his children. It is another thing to counsel and urge violation of valid penal legislation. "Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.

177 F.2d at 599-600.

The court distinguished between interference with religious belief, which the government cannot do, and interference with practices, which they can do, and added that man

may not excuse his practices that are contrary to law because of his religious beliefs.

In support of its opinion, this court cited the well-accepted proposition that one with innocent motives, while awaiting a judicial decision upholding a doubtfully valid law, might regard it as not obligatory prior to its having been construed and upheld by a court, saying that this was not the situation in the case before it. Similarly, it is not the case here. There can be no doubt as to the constitutional validity of the statute which prohibits jury tampering.

Other cases are annotated in 21 Am. Jur.2d, *Criminal Law* § 95 (those dealing with the mistaken belief of the constitutionality of a statute, hold that it is not a valid excuse), § 92 (religious belief cannot be accepted as a justification of an act made criminal by the law of the land), § 85 (distinguishes a good motive from the intent to commit a crime). *See also* 22 C.J.S. *Criminal Law*, §§ 48, 51, which contains a discussion on ignorance or mistake of law as not a defense, and religious belief as not being justification or excuse for commission of a crime.

We conclude that the trial court was correct in submitting the cause to the jury, and also in its interpretation of the applicable law in this case. There is no support for the defendant's position that a conscientious belief that a law is unconstitutional or contrary to the common law constitutes a good defense. This is an illfounded notion.

Accordingly, the judgment of the district court should be and the same is hereby affirmed.

APPENDIX B

JANUARY TERM - March 5, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Luther L. Bohanon, District Judge*

UNITED STATES of America,
Plaintiff-Apellee,

v.

Tim Z. OGLE, Defendant-Appellant.

No. 78—1625

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc filed by the appellant.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Holloway and Doyle and District Judge Bohanon, the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

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*Of the Western District of Oklahoma, sitting by designation.

APPENDIX C

UNITED STATES CONSTITUTIONAL PROVISIONS

FIRST AMENDMENT, UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

FIFTH AMENDMENT, UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES STATUTES

18 USC 201

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section:

"public official" means Member of Congress, the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government or a juror; and

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent —

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty; or

(d) Whoever, directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom; or

(e) Whoever, directly or indirectly, corruptly asks, demands, exerts, solicits seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person

or entity in return for being influenced in his testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom —

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; or

(h) Whoever, directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of his absence therefrom; or

(i) Whoever, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of the testimony under oath or affirmation given or to be given by him as a witness upon any such trial, hearing, or other proceeding, or for or because of his absence therefrom —

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(j) Subsections (d), (e), (h), and (i) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial hearing, or proceeding, or in the case of expert witnesses, involving a technical or professional opinion, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(k) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504 and 1505 of this title.

18 USC 1503

§ 1503. Influencing or injuring officer, juror or witness generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding

before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

18 USC 1504

§ 1504. Influencing juror by writing

Whoever attempts to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in relation to such issue or matter, shall be fined not more than $1,000 or imprisoned not more than six months, or both.

Nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury. June 25, 1948, c. 645, 62 Stat. 770.

18 USC 1505

§ 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress —

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

As amended Oct. 15, 1970, Pub.L. 91-452, title IX, § 903, 84 Stat. 947; Sept. 30, 1976, Pub.L. 94-435, Title I, § 105, 90 Stat. 1389.

Supreme Court, U. S.
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No. 79-1737

In the Supreme Court of the United States

OCTOBER TERM, 1979

TIM Z. OGLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the district court's instructions to the jury erroneously defined the word "corruptly" as used in the obstruction of justice statute, 18 U.S.C. 1503.

2. Whether the district court's instructions on proof of intent constituted reversible error.

3. Whether defense counsel's failure to object to the jury instructions on intent deprived petitioner of the effective assistance of counsel.

4. Whether the district court erred in sustaining objections to questions asked petitioner on redirect examination.

5. Whether the prosecutor's question to a witness who claimed her Fifth Amendment privilege was reversible error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 53-80) is reported at 613 F. 2d 233.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1979. A petition for rehearing was denied on March 5, 1980 (Pet. App. 81). On March 24, 1980, Mr. Justice White extended the time for filing a petition for a writ of certiorari to May 4, 1980, and the petition was filed on May 1, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to 15 months' imprisonment and fined $500. The court of appeals affirmed (Pet. App. 53-80).

The evidence at trial established that petitioner, a pilot for Continental Airlines, was a member of a group opposed to the federal income tax. Beginning in February 1978, petitioner conducted a tax course using a text that he authored entitled "Good Citizenship with Constitutional Tax Return and Procedures" (II R. 180-181; III R. 277, 308; Gov't Exh. 2).[1] This book teaches that tax crimes are not true crimes, and it gives instructions and provides forms for filing W-4 Employee Withholding Allowance Certificates designed to prevent the withholding of taxes, for filing returns that invoke the Fifth Amendment and disclose only the taxpayer's name and address, and for filing nameless tax returns. The book

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[1] "R." refers to the record on appeal.

also explains that a jury has a right of nullification to acquit for any reason, which it can exercise to protect citizens against unjust laws (Gov't Exh. 2 at 9-10, 12).

A pamphlet entitled "Handbook for Jurors" was also used in the tax course. This Handbook discusses the principle of jury nullification, noting that juries are not given instructions on this subject (Gov't Exh. 1; II R. 133-134; III R. 268, 296). The distribution of this pamphlet to jurors was discussed in the tax class (II R. 147-149).

On February 21, 1978, petitioner was present at the trial of one Norman Gigax, who was charged with filing a false W-4 employee withholding form (II R. 84-86). Among the jurors selected was Colleen Hansen, whom petitioner recognized as a Continental flight attendant (III R. 249). At the morning recess, petitioner introduced himself to Gigax and mentioned his acquaintanceship with Mrs. Hansen (III R. 248, 252). Later, in the courthouse elevator, petitioner said hello to Mrs. Hansen, who recognized him as a Continental Airlines pilot. After the luncheon recess, petitioner, at Gigax's request, sat at the defense table and took notes (II R. 86-87; III R. 249-252).

That evening, petitioner telephoned Jacquelyn Lagoni, another Continental flight attendant who was a student in petitioner's tax course and knew Colleen Hansen (II R. 127-129, 133-134). Petitioner stated that Mrs. Hansen was a juror in a pending case and inquired whether she had seen a copy of the "Handbook for Jurors" (II R. 134-135, 195; III R. 260-261, 294). Approximately 15 minutes after this conversation, Lagoni called Mrs. Hansen and said that she knew Hansen was a juror on the *Gigax* case because petitioner had seen her at the courthouse. Lagoni mentioned the "Handbook for Jurors" and asked Hansen if she would like a copy. Lagoni offered either to have

petitioner deliver a copy or to do so herself. Mrs. Hansen refused the offer and reported the incident to the judge (II R. 87, 89-91, 131, 196, 200-201).

Petitioner was thereafter indicted for obstruction of justice. In his own defense, petitioner testified that he called the Lagonis to reschedule a dinner date and to satisfy his curiosity whether Mrs. Hansen had seen the Handbook. He denied that he had called with any intention to have Mrs. Lagoni contact Mrs. Hansen or that he had made any such suggestion to Mrs. Lagoni (III R. 259-261, 269-270).

ARGUMENT

1. Petitioner contends (Pet. 14-20) that the district court erred in instructing the jury as to the meaning of the term "corruptly" in 18 U.S.C. 1503. After describing the charges alleged in the indictment (V R. 3) and reading the pertinent language of the statute (V R. 5),[2] the court instructed the jury as follows (V R. 6-7):

> [An essential element of the offense is] that [petitioner's] acts in causing the petit juror to be contacted were done corruptly and also with the specific intent to impede or influence a petit juror or to impede or obstruct the administration of justice.
>
> * * * * *
>
> [T]he word "endeavor" means any effort to attempt to accomplish the evil purpose that the statute was

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[2]The statute reads in pertinent part:

> Whoever corruptly * * * endeavors to influence, intimidate, or impede any * * * petit juror * * * in the discharge of his duty * * * or corruptly or by threats of force * * * influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

> designed to protect, and the word "corruptly" means any endeavor to influence a juror in the performance of his or her duties or to influence, obstruct or impede the due administration of justice * * *.[3]

Petitioner claims that the district court erred in refusing to give his proposed instructions (Pet. 14-15; V R. 16-17):

> The word "corruptly" means an endeavor, done with a wicked or evil purpose, to influence a juror in the performance of his or her duties or to influence, obstruct or impede the due administration of justice.

However, read as a whole (see, *e.g.*, *United States* v. *Park*, 421 U.S. 658, 674 (1975)), the court's charge adequately apprised the jury of the requisite mental element of the offense. The court explained to the jury that a finding of guilt must rest on a determination that petitioner acted "with the specific intent to do something that the law forbids, that is to say with a bad purpose either to disobey or to disregard the law" (V R. 7). The court several times reiterated that petitioner must have acted "corruptly" in order to be convicted (V R. 3, 5, 6) and explained that an "endeavor" undertaken "corruptly" was "any effort to attempt to accomplish the evil purpose that the statute was designed to protect * * *" (V R. 6). Finally, the court's repeated use of the phrases "influence and impede" and "influence, obstruct, or impede" (V R. 3, 5-7) also imparted to the jury the sense that a wrongful intention is required under the statute. See *United States* v. *Partin*, 552 F. 2d 621, 642 & nn. 26, 27 (5th Cir. 1977). While the court's instructions

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[3]These instructions were derived from *Broadbent* v. *United States*, 149 F. 2d 580, 581 (10th Cir. 1945), and are set out in 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* §§ 32.04, 32.05 (3d ed. 1977).

undoubtedly could have more clearly compartmentalized the elements pertaining to "corruptly" and "endeavor," they sufficiently conveyed to a "reasonable jury exercising common sense" (*United States* v. *Johnson*, 585 F. 2d 119, 128 (5th Cir. 1978)) that it "had to find * * * there was a corrupt endeavor which was an effort to wrongly influence [Mrs. Hansen]" (Pet. App. 67) See also *United States* v. *Jackson*, 607 F. 2d 1219, 1221-1222 (8th Cir. 1979), cert. denied, No. 79-993 (Feb. 19, 1980). The exact wording requested by petitioner was only an alternative formulation of an idea adequately expressed in the instructions as given.[4]

Nor, contrary to petitioner's assertion, does the decision below create a conflict in the circuits. The courts of appeals are uniformly in agreement that the word "corruptly" in 18 U.S.C. 1503 means that the endeavor to influence must be made with a specific intent to achieve a wrongful purpose. See *United States* v. *Baker*, 611 F. 2d 964, 967-968 (4th Cir. 1979); *United States* v. *Lazzerini*, 611 F. 2d 940, 942 (1st Cir. 1979); *United States* v. *Jackson*, *supra*, 607 F. 2d at 1221-1222 (8th Cir.); *United States* v. *Fasolino*, 586 F. 2d 939, 941 (2d Cir. 1978); *United States* v. *Haas*, 583 F. 2d 216, 220 (5th Cir. 1978), cert. denied, 440 U.S. 981 (1979); *United States* v. *Haldeman*, 559 F. 2d 31, 114 n. 226 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); *United States* v. *White*, 557 F. 2d 233, 235 (10th Cir. 1977); *United States* v. *Ryan*, 455

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[4]Petitioner impliedly suggests that the court's instructions in this case would allow a jury to convict an innocent or lawful endeavor to influence a juror. As already discussed, however, the instructions were adequate to foreclose this possibility. See also *United States* v. *Jackson*, *supra*; *United States* v. *Partin*, *supra*. Moreover, petitioner's defense at trial was not that he had endeavored to influence Mrs. Hansen for some innocent or benevolent purpose, but rather that he had not endeavored or caused anyone to endeavor to influence her at all.

F. 2d 728, 734 (9th Cir. 1971); see also *Pettibone* v. *United States*, 148 U.S. 197, 206 (1893). This central idea is variously expressed by the courts in such terms as "for an improper motive" (*Martin* v. *United States*, 166 F. 2d 76, 79 (4th Cir. 1948)), "for an evil or wicked purpose" (*United States* v. *Ryan*, *supra*, 455 F. 2d at 734), or "having an evil or improper purpose or intent" (*United States* v. *Haldeman*, *supra*, 559 F. 2d at 114 n.226). However, no specific terminology is required, provided that, as occurred here, the jury is properly advised of the nature of the defendant's intent required to convict. See *United States* v. *Haas*, *supra*, 583 F. 2d at 220; cf. *United States* v. *Abrams*, 427 F. 2d 86, 90 (2d Cir.), cert. denied, 400 U.S. 832 (1970).[5]

2. Petitioner also challenges (Pet. 20-26) the district court's instructions to the jury on the question of proof of intent. The court's charge included the following statement (V R. 8):

> While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails

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[5]Petitioner additionally argues (Pet. 46-48) that the district court's instructions on the meaning of "corruptly" have eliminated the distinction between the offense of obstruction of justice defined in 18 U.S.C. 1503 and that defined in 18 U.S.C. 1504, which does not on its face require that the attempt to influence be done corruptly. As discussed above, however, the court's instructions in this regard adequately informed the jury of the meaning of the term "corruptly" as used in 18 U.S.C. 1503. Since the jury was correctly instructed on this element of the offense, there is also no merit to petitioner's argument (Pet. 26-29) that the court's charge has placed a chilling effect upon the exercise of First Amendment rights innocently to influence jurors. We also note that the jury was instructed that the First Amendment protected the expression and dissemination of the views contained in the "Handbook for Jurors" and petitioner's views on the income tax system, that petitioner was not on trial for advocating these views, and that a guilty verdict could not be based on the fact that petitioner had promoted these views or distributed the Handbook (V R. 26).

> to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted, but what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged, and it is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted, so unless the contrary appears from the evidence the jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

Petitioner claims that the Tenth Circuit is in conflict with the other courts of appeals regarding the propriety of this so-called "*Mann*" charge (see *Mann* v. *United States*, 319 F. 2d 404, 407 (5th Cir. 1963), cert. denied, 375 U.S. 986 (1964)), and that the court erred in holding that the instruction, to which no objection was raised at trial, was not "plain error" in this case.

Several court of appeals have disapproved the *Mann* charge on the ground that it may be interpreted by a jury to shift the burden of proof on criminal intent to the defendant; however, they have generally found that other parts of the instructions to the jury cured the problem in individual cases. See, *e.g.*, *United States* v. *Jackson*, *supra*, 607 F. 2d at 1220-1221 (8th Cir.); *United States* v. *Spiegel*, 604 F. 2d 961 (5th Cir. 1979), cert. denied, Nos. 79-1184, 79-1194 (May 12, 1980); *United States* v. *Reeves*, 594 F. 2d 536, 540-541 (6th Cir.), cert. denied, 442 U.S. 946 (1979); *United States* v. *Garrett*, 574 F. 2d 778 (3d Cir.), cert. denied, 436 U.S. 919 (1978); *United States* v. *Chiantese*, 560 F. 2d 1244 (5th Cir. 1977) (en banc); *United States* v. *Robinson*, 545 F. 2d 301 (2d Cir. 1976);

United States v. *Diggs*, 527 F. 2d 509 (8th Cir. 1975); *Cohen* v. *United States*, 378 F. 2d 751 (9th Cir.), cert. denied, 389 U.S. 897 (1967); *United States* v. *Releford*, 352 F. 2d 36 (6th Cir. 1965), cert. denied, 382 U.S. 984 (1966). Indeed, contrary to petitioner's assertion, the Tenth Circuit does not favor this charge. See *United States* v. *Heath*, 580 F. 2d 1011, 1025 (10th Cir. 1978), cert. denied, 439 U.S. 1075 (1979); *United States* v. *Smaldone*, 484 F. 2d 311, 321 (10th Cir. 1973), cert. denied, 415 U.S. 915 (1974); *United States* v. *Woodring*, 464 F. 2d 1248, 1251 (1972). In line with the approach generally followed by the other courts of appeals, the Tenth Circuit examines the charge in the context of the entire set of instructions to determine whether, in a given case, the jury was likely to have been misled as to the proper allocation of the burden of proof. What petitioner claims to be a multiplicity of standards is really a case-by-case determination of the adequacy of the overall instruction in light of the particular circumstances. See also *United States* v. *Haldeman*, 559 F. 2d 31, 116-117 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977).[6]

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[6]We recognize that the Fifth Circuit has prospectively established a stricter standard of review for *Mann* charges, holding that such instructions, although not automatically grounds for reversal, are erroneous and cannot be cured in future cases by reference to correct statements elsewhere in the charge regarding the government's burden of proof. Whatever differences may ultimately result from this exercise of the Fifth Circuit's supervisory power, we do not believe that the situation warrants the intervention of this Court at present. The courts of appeals have recognized the potential danger of *Mann* charges and have carefully reviewed claims that such a charge was likely to have prejudiced a defendant. We submit that the precise approach to resolving the *Mann* issue—either to adhere to a case-by-case determination or to follow the Fifth Circuit in establishing a supervisory rule—is best left at this point to the informed judgment of each circuit.

Applying this standard in the instant case, it is clear that the instructions in their entirety adequately conveyed the nature of the government's burden of proof on the issue of intent. At the outset, the jury was told that it was not to single out any particular instruction but instead was to consider all the instructions (V R. 2), and this admonition to consider the instructions as a whole was repeated at the conclusion of the charge (V R. 15). The court further informed the jury that "[t]he burden is always on the prosecution to prove guilt beyond a reasonable doubt, and this burden never shifts to a defendant, for the law never imposes upon a defendant the duty of calling any witnesses or producing any evidence" (V R. 4-5); this instruction was repeated several times (V R. 6, 12, 13). Moreover, immediately before the challenged portion of the charge, the court explained to the jury that "[w]ith respect to lesser offenses, * * * intent may be presumed from the voluntary doing of the forbidden act, but with respect to major crimes such as charged in this case specific intent must be proved before there can be a conviction. Specific intent, as the term itself suggests, requires more than a mere general intent to engage in certain conduct" (V R. 7-8). And, directly following the contested instruction, the court specifically stated that "[i]n determining the issue as to intent, the jury are entitled to consider any statement made and acts done or omitted by the accused and all facts and circumstances in evidence which may aid determination of state of mind" (V R. 8).

Thus, notwithstanding general criticisms of the *Mann* charge (see 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.13 (3d ed. 1977)), it is clear that in this case the instructions as a whole neither shifted the burden of proof to the defendant nor invited the jury to disregard the totality of the circumstances concerning petitioner's intent. Since the objectionable phrase in the

court's charge was but one small part of a complete and correct exposition of how the jury should proceed in determining whether the government had proved petitioner's intent, the court of appeals properly concluded that the instructions were not plain error.[7]

3. Petitioner next claims (Pet. 29-33) that he was denied the effective assistance of counsel at trial because his attorney failed to object to the court's instruction on proof of intent. This one alleged error on the part of defense counsel is not enough to demonstrate inadequate representation. The assistance of counsel need not be errorless to be effective. See *Cooper* v. *Fitzharris*, 551 F. 2d 1162 (9th Cir. 1977); *Salazar* v. *Estelle*, 547 F. 2d 1226 (5th Cir. 1977). Moreover, as discussed above, the instructions in their entirety were proper, and the one objectionable portion of the court's charge on intent was very unlikely to have misled the jury. Cf. *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970).

The general rule is that the question of the effective assistance of counsel should ordinarily be left to the "good sense and discretion of the trial courts." *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970). Here, the district

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[7]Petitioner's reliance (Pet. 22-23) on *United States* v. *Robinson*, 545 F. 2d 301 (2d Cir. 1976), is misplaced. Although the charge given in that case was very similar to the one in the instant case, it was the only instruction given the jury on proof of intent. Thus, the court of appeals concluded that, in the absence of a more complete and accurate explanation in the instructions as a whole, the jury probably had a mistaken view of the government's burden of proof on the issue of intent. Other cases cited by petitioner also presented quite different circumstances. In *United States* v. *Arthur*, 544 F. 2d 730, 736-737 (4th Cir. 1976), the instruction, instead of being phrased as a permissive inference, directed the jury to find intent from "the natural result of [the defendant's] actions." And in both *United States* v. *Orrico*, 599 F. 2d 113, 119 n.5 (6th Cir. 1979), and *United States* v. *Diggs*, 527 F. 2d 509, 514-515 (8th Cir. 1975), the court reversed for insufficiency of the evidence and found a *Mann* charge prejudicially erroneous in light of the weakness of the government's case.

court specifically found that counsel was competent, stating that he "did a good job * * * he did as well as anybody could" (VIII R. 20-21), and the court of appeals agreed with that judgment (Pet. App. 64). The record demonstrates that defense counsel in this case performed "within the range of competence demanded of attorneys in criminal cases" (*McMann* v. *Richardson*, *supra*, 397 U.S. at 771), and there is simply no basis for a conclusion of incompetent representation.

4. Petitioner further contends (Pet. 33-42) that the district court erred in excluding certain defense testimony that pertained to the issue of petitioner's criminal intent.

a. On redirect examination, petitioner was asked by his counsel whether he had taken any action designed to influence Colleen Hansen with respect to the *Gigax* case and whether his telephone call to Jacquelyn Lagoni was made with the intent to influence Mrs. Hansen in the exercise of her duty. The district court sustained objections to both questions (III R. 305-306). Petitioner claims that this was an erroneous exclusion of evidence critical to his defense.

The record establishes, however, that the answers to these questions would in fact have been entirely repetitious of petitioner's other testimony. Petitioner testified on direct examination, on cross examination, and on redirect (immediately following the excluded questions) that his intent in calling Mrs. Lagoni was to rearrange a dinner date and to satisfy his curiosity whether Mrs. Hansen had seen the Handbook (III R. 258-260, 287, 306). His similar testimony before the grand jury was also in evidence (III R. 288-291). In addition, petitioner testified that he did not ask Mrs. Lagoni to call Mrs. Hansen; that he said nothing that would have led Mrs. Lagoni to believe he wanted her to call Mrs.

Hansen; and, in answer to questions almost identical to those later objected to, that he never attempted either to contact Mrs. Hansen or to have Mrs. Lagoni do so for the purpose of influencing Mrs. Hansen's decision as a juror (III R. 261, 269-270). In these circumstances, the court of appeals correctly held (Pet. App. 70) that the district court acted within its discretion in disallowing the repetitive testimony.

b. The district court also excluded petitioner's testimony about the research he had conducted that formed the basis for his beliefs on jury nullification (III R. 268-269). Petitioner's contention that this testimony would have negated the element of criminal intent is incorrect. As the jury was expressly instructed (V R. 26), petitioner was on trial for his efforts to obstruct justice, not for disseminating the Handbook or for believing or advocating the views contained therein. Whatever petitioner's beliefs in the correctness of the ideas taught in the Handbook, and whatever his motives may have been in advocating those ideas, they were not relevant to the question of his intent to violate the statute. See *United States* v. *Quilty*, 541 F. 2d 172, 175 (7th Cir. 1976); *United States* v. *Malinowski*, 472 F. 2d 850, 855-859 (3d Cir.), cert. denied, 411 U.S. 970 (1973); *United States* v. *Porth*, 426 F. 2d 519, 523 (10th Cir.), cert. denied, 400 U.S. 824 (1970). Moreover, petitioner did not in fact seek to offer a defense that he had endeavored to influence Mrs. Hansen in good faith; rather, the entire thrust of his defense was a complete denial of any effort to offer the Handbook to Colleen Hansen or to influence her in any way.

Petitioner had already been allowed to testify at some length regarding his personal beliefs on jury nullification and the purpose of the Handbook (III R. 263-268), although this evidence was not strictly material to any valid defense. When the district court refused to allow

him to discuss his underlying research, it was acting well within its discretion to exclude irrelevant and cumulative evidence.

5. Petitioner lastly argues (Pet. 42-46) that the prosecutor engaged in misconduct by asking Jacquelyn Lagoni about her W-4 tax withholding form, since he had previously been informed of her intention to claim her Fifth Amendment privilege with regard to that subject (II R. 10).

The single disputed question occurred after Mrs. Lagoni had been called as a government witness[8] and testified that the subject of filing W-4 forms was discussed in petitioner's tax class. The prosecutor then inquired, "And during the period of time that you took this class, did you change your W-4 form?" (II R. 154). Mrs. Lagoni invoked the Fifth Amendment and refused to answer the question. Petitioner's counsel objected, referring to the advance notice given to the government that the witness intended to assert her privilege if questioned on that subject. The prosecutor responded that he did not believe Mrs. Lagoni had a valid claim of privilege regarding the one question he had posed. The district judge agreed, but advised the prosecutor not to continue that line of examination (II R. 155). No further questions on the subject were asked.

In this case, as in *Namet* v. *United States*, 373 U.S. 179, 188 (1963), the prosecutor did not believe that Mrs. Lagoni could properly invoke her privilege against self-incrimination in response to the simple question whether she had changed her W-4 form, and his position was upheld by the district court. Government questioning that elicits a claim of privilege can only be error when the

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[8]The government had granted immunity to Mrs. Lagoni with respect to the charge of obstruction of justice.

witness has a valid Fifth Amendment claim. *United States* v. *Hearst*, 563 F. 2d 1331, 1341-1342 (9th Cir. 1977), cert denied, 435 U.S. 1000 (1978). And "certainly the prosecutor need not accept at face value every asserted claim of privilege, no matter how frivolous." *Namet* v. *United States*, *supra*, 373 U.S. at 188.

In contrast to *United States* v. *King*, 461 F. 2d 53, 56-57 (8th Cir. 1972), and *Robbins* v. *Small*, 371 F. 2d 793, 794-795 (1st Cir.), cert. denied, 386 U.S. 1033 (1967), upon which petitioner relies (Pet. 46), the government in the instant case neither called Mrs. Lagoni for the sole purpose of eliciting a claim of privilege nor exploited her silence by asking a series of questions designed to leave damaging inferences in the minds of the jurors. Rather, as in *Namet*, the witness here had considerable evidence to offer that supported the government's case. Moreover, petitioner's objection relates to only a single question during a lengthy examination, and it is most unlikely that this brief episode adversely affected the jury.[9] Finally, as the court of appeals observed (Pet. App. 76-77), there is no indication whatever of a deliberate attempt by the prosecutor to prejudice petitioner's case. Accordingly, it cannot be concluded that the government was guilty of misconduct by making "a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege" or by seeking to use such inferences to add "critical weight to the prosecution's case in a form

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[9]We also note that the aspects of Mrs. Lagoni's testimony that tended to exonerate petitioner were materially different from the testimony given by her husband and were directly contradicted by the testimony of Mrs. Hansen. Thus, in comparison to this substantial evidence casting serious doubt on her testimony, Mrs. Lagoni could have been discredited only minimally, if at all, by the single question concerning her W-4 form.

not subject to cross-examination." *Namet* v. *United States*, *supra*, 373 U.S. at 186-187. See also *Douglas* v. *Alabama*, 380 U.S. 415, 419-420 (1965).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1980

Supreme Court, U. S.
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NO. 79-1737

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

TIM Z. OGLE,	)	
	)	
Petitioner,	)	On Petition for a
	)	Writ of Certiorari
v.	)	to the United States
	)	Court of Appeals
UNITED STATES OF AMERICA,	)	for the Tenth Circuit
	)	
Respondent.	)	

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I
INTRODUCTORY STATEMENT

This Reply Memorandum is submitted primarily to correct two serious misstatements in the Governments Brief in Opposition and to cite to the Court a new decision on the issue of effective assistance of counsel pertaining to the failure to request an appropriate instruction on a critical issue. Limitation of this Memorandum to these three matters does not indicate any abandonment of the other reasons why the writ should be granted, but is merely an indication that, as to such other reasons, the Petition for the Grant of a Writ, needs no further clarification or additional argument.

The two matters which, unfortunately, do require further discussion are:

1. The assertion by the Government that any error in the definition of corruptly cannot be prejudicial to Mr. Ogle because his defense at trial was that he had not endeavored or caused anyone to endeavor to influence the juror involved.

2. The obfuscation of the purport of the instructions under 18 USC 1503 given by the trial court and approved by the United States Court of Appeals for the Tenth Circuit, and of the fact that such approval creates a serious conflict between the Circuits which require resolution by this Court.

These will be dealt with in that order. After these two matters the new decision will be cited and discussed briefly.

II

MR. OGLE MAINTAINED TWO DEFENSES AT HIS TRIAL, AS HE WAS ENTITLED TO DO. THE FIRST WAS FACTUAL AND THE SECOND LEGAL.

The Government argues that:

> "Moreover, petitioner's defense at trial was not that he had endeavored to influence Mrs. Hansen for some innocent or benevolent purpose, but rather that he had not endeavored or caused anyone to endeavor to influence her at all." (Brief in Opposition, p. 5, ft. 4).

This statement, even if it were true, and it is not, is a weak reed in a brief in opposition to certiorari. If it were true, it would be proper to argue on the merits to show that even if an error had been made, it was harmless. It would have been proper, indeed, if the Court of Appeals had relied thereon, but the Tenth Circuit did not. While that Circuit seriously misstated Mr. Ogle's legal argument, it did recognize that he had raised a legal defense in addition to his factual one (Pet. App., p. 66-67).

There would be no conflict between the Circuits, if the Tenth Circuit had said that Mr. Ogle's requested definition of "corruptly" should have been given but that the error was harmless because his sole defense was that he had not made any such endeavor. Indeed this was urged by the United States Attorney in his brief to the Court of Appeals, but that Court, to its credit, rejected the invitation and met the second issue. In so doing, unfortunately, it created the serious conflict between the Circuits on the meaning of "corruptly" as that word is used in 1503.

While it is true that Mr. Ogle's primary defense was that he had not made the requisite endeavor to be convicted under 1503, his second line of defense was that even if the jury choose to believe differently, his motives were not corrupt.

Even if it be assumed that such defenses were inconsistent, the law is clear that "Alternative defenses, of course, are proper, even if inconsistent." (*United States v. King,* 587 F.2d 956, 965 (9th Cir. 1978); *United States v. Demma,* 523 F.2d 981, 985, and cases cited at ft. 6 (9th Cir. 1975) (en banc); *Whitaker v. United States,* 281 F.2d 631, 632 (DC Cir. 1960).

Mr. Ogle's counsel at the trial in his motion for a directed verdict stated his additional defense which pertained to the nature of the Handbook and its contents (Vol. III, pp. 237-238). The Trial Court in denying the motion stated:

> "A fair reading of that handbook shows that it in itself is an effort to impede and obstruct justice." (Vol. III, p. 243.)

After this ruling, it was clear to Mr. Ogle that he not only had to defend on the physical facts, but that his beliefs and the purity of his motives were also critical issues. He tried, under the severe limitations imposed upon him by the Trial Court, to make this clear to the jury, *i.e.,* that even if he had tried to have the Handbook delivered to Mrs. Hansen, which he denied, the action was not done "corruptly" since he had no evil motive. (See *e.g.,* Vol. III, pp. 263-269; see also discussion in Chambers, Vol. III, p. 322). The Trial Court recognized, albeit belatedly, that at least some of these matters were in issue since it did give instruction which allowed the jury to determine if the Handbook would influence a juror or would impede or obstruct the due administration of justice before they might find Mr. Ogle guilty for endeavoring to distribute the same to a sitting juror. (Vol. V, p. 26.) Unfortunately before this change of position the trial court made its evidentiary rulings against Mr. Ogle based upon the position quoted above.

Additionally, Mr. Ogle put the matter of improper motive in issue by denying that he had a personal interest, other than humanitarian, in the outcome of the Gigax case (Vol. III, p. 274, lines 10-25; p. 275, line 1). Nothing in the record contradicts his statement in that regard.

III

CONTRARY TO THE ASSERTION OF THE GOVERNMENT THE DECISION BELOW CREATES A SERIOUS CONFLICT BETWEEN THE CIRCUITS ON THE MEANING OF THE WORD "CORRUPTLY" IN 1503, AND ON THE INSTRUCTIONS WHICH MUST BE GIVEN TO A JURY THEREON.

If as the Tenth Circuit would have it, any endeavor, is *per se* corrupt, then the word "corruptly" is both unnecessary and meaningless in the statute. To take that position would be to assume that the Congress did not mean anything at all when it inserted that critical word. This Court does not take such a position in interpreting criminal statutes (e.g. *Jeffers v. United States,* 432 US 137, 148-149 (1977))

The Government has seriously misstated the import of the instructions given on the meaning of corruptly, endeavor and specific intent:

> The court explained to the jury that a finding of guilt must rest on a determination that petitioner acted "with the specific intent to do something that the law forbids, that is to say with a bad purpose either to disobey or to disregard the law" (V R. 7). The court several times reiterated that petitioner must have acted "corruptly" in order to be convicted (V R. 3, 5, 6) and explained that an "endeavor" undertaken "corruptly" was "any effort to attempt to accomplish the evil purpose that the statute was designed to protect * * *" (V R. 6). Finally, the court's repeated use of the phrases "influence and impede" and "influence, obstruct, or impede" (V R. 3, 5-7) also imparted to the jury the sense that a wrongful intention is required under the statute. (Brief in Opposition, p. 5).

The Government seeks to negate the serious impropriety of the definition of "corruptly" as "any endeavor to influence a juror in the performance of his or her duties or to influence, obstruct or impede the due administration of justice. . . ." (Brief in Opposition, p. 4) by its emphasis on the number of times the trial court used the word "corruptly" in the course of its instructions. The repetition of a word which has been incorrectly defined adds to, rather than detracts from, the harm caused by such erroneous definition.

The word "corruptly" when used in a statute which also requires specific intent must mean that motive as well as intent are each integral parts of the Government's burden of proof. (See cases cited in Petition, pages 16-18 and particularly *United States v. Lazzerini,* 611 F.2d 940, 942 (1st Cir. 1979) for its analysis of Section 1503 on this very point.) The "critical ingredient" is "corrupt motive."

The fact that the word "endeavor" was correctly defined does not change that result. Proof of the endeavor is essential to prove the specific intent and is not necessarily part of the motivation.

Even the trial court in this case recognized that the motivation of the accused and his intent were two separate factors. Just prior to the incorrect definition of corruptly, the jury was instructed that:

> "Then, third that the defendant's acts in causing the petit juror to be contacted were done corruptly *and also* with the specific intent to impede or influence a petit juror or to impede or obstruct the administration of justice." (emphasis supplied) (Transcript Vol. V, p. 6).

It is indeed, ironic, that after recognizing the separate qualities of motive and intent, the trial court eliminated the first by equating it to any endeavor. Thus the statute was changed to read, in effect: "Whoever endeavors . . ." The Congress could make that change, but not the Courts.

There are cases in which the nature and factual situations of the endeavor itself also sheds light on motivation.

The Government, in an effort to support this incorrect definition, cites two of them (Brief in Opposition, p. 5). In the first, the endeavor was the action of an employer to get one of his employees not to tell certain facts to a Grand Jury (*United States v. Johnson,* 585 F.2d 119, 123 (5th Cir. 1978).

The opinion itself does not quote the definition, if any, of the term "corruptly" as given the jury by the trial court. It must be remembered that this was 1978 Fifth Circuit decision, and one member of the panel, Judge Hill, also had been a member of the panel which decided the earlier 1978 5th Circuit decision in *United States v. Partin,* 552 F.2d 621, 642. The *Partin* decision endorsed as correct, the definition of "corruptly" as meaning that ". . . a defendant acted with improper motive or with bad or evil or wicked purpose," and the decision in *Johnson* did not distinguish *Partin,* but rather cited the same authority as used in *Partin* for this point, i.e. *United States v. Ryan,* 455 F.2d 728, 734 (9th Cir. 1971).

In the second, the endeavor was to talk to prospective veniremen about a forthcoming trial of a friend of Jackson and to tell them to listen for the word "harassment." (*United States v. Jackson,* 607 F.2d 1219, 1221 (8th Cir. 1979). In that case the Trial Court instruct, in pertinent part:

> "In this, the word 'corruptly' means willfully, knowingly, and with the specific intent to influence a juror to abrogate his or her legal duties as a petit juror." (Id.)

This is a far cry from an instruction which says that any endeavor to influence a juror is corrupt.

The Tenth Circuit put its *imprimatur* on the erroneous definition of "corruptly" with these words:

> It really means unlawful, and this is the way that Judge Arraj interpreted it and put it in terms of the facts of this case. In other words, he said that an endeavor to influence a juror in the performance of his or her duty or to influence, obstruct or impede the

due administration of justice is per se unlawful and is tantamount to doing the act corruptly. We approve fully the trial court's interpretation. (Pet. App. 66).

It is precisely this stamp of approval of the trial court's definition of "corruptly" which, contrary to the assertion of the Government (Brief in Opposition, p. 5) is in conflict with the decisions of other Circuits which have addressed the same issue.

Further the Government seeks to confuse the matter by stating:

> "However, no specific terminology is required provided that, as occurred here, the jury is properly advised of *the nature of the defendant's intent* required to convict." (emphasis supplied) (Brief in Opposition, p. 6).

The nature of the intent required was that it be specific. There is no argument about that. What is in issue here is the conflict between the circuits as to the *motive* or *purpose* required for a 1503 conviction. The Tenth Circuit says that "any endeavor . . . is *per se* unlawful and is tantamount to doing the act corruptly." The other circuits which have ruled on this matter have all equated the term corruptly with something much more than just the specific intent to influence a juror. The touchstone of the crime for them is the motivation of the defendant for such acts.

To be found guilty of a violation of 1503 one's motives must be found to be corrupt, i.e. with an evil purpose. Attempted unlawful communication to a juror without such evil motivation will at most support a conviction under 18 USC 1504.

IV

THE FAILURE TO REQUEST A PROPER INSTRUCTION ON PROOF OF SPECIFIC INTENT WAS, UNDER THE CIRCUMSTANCES OF THIS CASE, SUFFICIENT TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

Where an issue is critical, and Mr. Ogle's intent was an essential element which the jury had to determine, it is defense counsel's duty to inform himself of the applicable law and to request an appropriate instruction on that point. This is especially true with matters pertaining to the burden of persuasion. A failure to do this cannot be considered to be a matter of trial tactics and is sufficient to establish ineffective assistance of counsel (*McNulty v. Olim,* 488 F Supp. 1384, 1388-1390 (D Hawaii, 1980).

While in *McNulty,* the Court found that no prejudice was shown, after making the finding of ineffective assistance of counsel, because of the strength of the evidence on the point in question, no similar finding could be made in this case. Evidence, if any, of the requisite specific intent by Mr. Ogle was slim and tenuous at best. It cannot be said with any degree of certainty that a correct instruction on proof of specific intent, which did not include the burden shifting "unless the contrary appears from evidence" phrase, might not have resulted in an acquittal.

The *McNulty* decision was not announced until May 9, 1980, and did not become known to counsel for Mr. Ogle until receipt of the Federal Supplement advance sheet, dated July 28, 1980, from West Publishing Co.

V
CONCLUSION

For these reasons, and those contained in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day 11th of August, 1980, three copies of the Petitioner's Reply Memorandum were mailed, postage prepaid, to: The Honorable Wade McCrea, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served, have been served.

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